

Missouri Attorney General's Opinions - 1983

Opinion	Date	Topic	Summary
5-83	Dec 29		Opinion letter to The Honorable John Dennis
7-83	Sept 9	CIRCUIT COURT. STATE AUDITOR. STATE AGENCY.	The State Auditor must audit the accounts of the circuit courts and all divisions of the circuit courts pursuant to Article IV, Section 13, Missouri Constitution, and Section 29.200, RSMo 1978.
8-83	Mar 2	COUNTY COLLECTOR. COMPENSATION. PROTESTED TAXES. TAXATION.	Taxes paid under protest as provided in Section 139.031, RSMo 1978, are not considered collected for the purpose of calculating the collector's commissions as provided in Sections 52.250, 52.260, 52.270, RSMo 1978, until such taxes are disbursed to the proper governmental entities. Statutes in effect at the time the protested taxes were paid and impounded in a separate account apply in determining the collector's compensation.
9-83	Sept 29	CIRCUIT COURT. COMPENSATION. COUNTY COURT. COURT REPORTER.	An official court reporter is not entitled to additional compensation for the transcription of grand jury evidentiary proceedings for the use of the prosecuting attorney pursuant to an order of a circuit judge under Section 540.105, RSMo 1978.
11-83	June 22		Opinion letter to Barrett A. Toan
12-83	Sept 27		Opinion letter to The Honorable James L. Mathewson
14-83	July 7	COUNTIES. COUNTY ROAD AND BRIDGE FUND. COUNTY SALES TAX. COUNTY COURTS.	<p>(1) The tax levy authorized by the first sentence of Article X, Section 12(a), Missouri Constitution, and Section 137.555, RSMo 1978, is part of the "total property tax levy" as that phrase is defined in Section 67.500(5), RSMo Supp. 1982, and is subject to the County Sales Tax Act roll back. Four-fifths of the funds generated by this levy from property in a special road district are credited to the special road district and are excluded from the calculation of the County Sales Tax Act roll back pursuant to Section 67.505.3, RSMo Supp. 1982.</p> <p>(2) The levy authorized by the second sentence of Article X, Section 12(a), Missouri Constitution, and Sections 137.565 to 137.575, RSMo 1978, is not part of the "total property tax levy" as that phrase is defined in Section 67.500(5), RSMo Supp. 1982, and is not subject to the County Sales Tax Act roll back.</p> <p>(3) Counties are not authorized to grant county sales tax revenues to special road districts.</p>

			(4) General road districts are those organized pursuant to Section 231.010, RSMo 1978.
<u>15-83</u>	Sept 19	DEPARTMENT OF MENTAL HEALTH. HANDICAPPED CHILDREN-PERSONS. MENTAL ILLNESS. MENTAL PATIENTS. MENTAL RETARDATION. MENTALLY DISTURBED CHILDREN.	The Department of Mental Health does not have authority to expend state funds for the placement of mentally disordered patients outside the State of Missouri.
<u>16-83</u>	Sept 29	ANNUITIES. RETIREMENT. STATE EMPLOYEES RETIREMENT SYSTEM.	Section 104.615, RSMo Supp. 1982, establishes a minimum normal annuity for members of the Missouri State Employees' Retirement System, and any elections made by a member pursuant to Sections 104.395 and 104.400.1, RSMo Supp. 1982, would result in an actuarial reduction to the minimum normal annuity; and the minimum annuity provisions of Section 104.615, RSMo Supp. 1982, shall be applied only to the normal annuity on all retirement benefit payments made by the Board of Trustees of the Missouri State Employees' Retirement System.
17-83			Withdrawn
<u>20-83</u>	May 25	STATE EMPLOYEES' RETIREMENT SYSTEM.	A member of the Missouri State Employees' Retirement System who works continuously until he or she is eligible to retire pursuant to Chapter 104, RSMo Supp. 1982, is entitled to credit for unused sick leave even though the member chooses to defer the payment of retirement benefits.
<u>21-83</u>	Sept 2	STATE EMPLOYEES' RETIREMENT SYSTEM.	The creditable prior service entitlement created by Section 104.345.6, RSMo Supp. 1981 (repealed), applies only to those members of the Missouri State Employees' Retirement System whose employment terminates on or after the effective date of Section 104.345.6, RSMo Supp. 1981 (repealed).
<u>22-83</u>	Mar 28		Opinion letter to Mary-Jean Hackwood
<u>26-83</u>	Dec 29		Opinion letter to The Honorable Dennis Smith
<u>27-83</u>	Oct 6	FARMERS HOME ADMINISTRATION. INTERGOVERNMENTAL TAX IMMUNITY. TAXATION - EXEMPTIONS.	The phrase “[n]o tax shall be imposed on lands the property of the United States; . . .” in Article III, Section 43, Missouri Constitution (1945), is merely a declaration of the intergovernmental tax immunity doctrine and does not create a tax exemption for purposes of 7 C.F.R. Section 1955.63(f)(1)(1983). When Congress has waived its tax immunity

		PROPERTY TAX. PROPERTY TAX EXEMPTION.	and consented to the taxation of its lands-as it has done with regard to land owned by the Farmers Home Administration in 42 U.S.C. Section 1490h (Supp. IV 1980)-Article III, Section 43, Missouri Constitution (1945), does not preclude state or local taxation of these federal lands.
<u>28-83</u>	Oct 6	DEEDS. RECORDING OF DEEDS.	Recorders of Deeds must record deeds in proper form submitted to him by a grantor pursuant to Section 442.380, RSMo 1978, even if the delivery of such has been repudiated by the grantee.
<u>30-83</u>	May 23		Opinion letter to Mr. Robert Luerding
<u>32-83</u>	June 15	BOARD OF PROBATION AND PAROLE. DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES. PROBATION AND PAROLE. PUBLIC MEETINGS. PUBLIC RECORDS. SUNSHINE LAW.	Subject to exceptions contained in Chapter 217, RSMo Supp. 1982, parole hearings and parole revocation hearings of the Board of Probation and Parole are subject to the Missouri Open Meetings Law.
<u>34-83</u>	June 9	CIRCUIT COURT. FAMILY SERVICES, DIVISION OF. GARNISHMENT. MARRIAGES. SOCIAL SERVICES, DEPARTMENT OF.	Both the court-ordered mandatory wage assignment pursuant to Section 452.350, RSMo Supp. 1982, and the order to withhold and pay over issued by the Director of the Missouri Division of Family Services, pursuant to Section 454.505, RSMo Supp. 1982, are "garnishments" within the meaning of the Consumer Credit Protection Act.
<u>35-83</u>	Dec 29	LAKE CONTRARY. LAKES. NAVIGABLE STREAMS AND WATERS. STATE WATERS. WATER PATROL.	Based upon the information available to this office with respect to the dates and manner in which the various lakes which you have inquired about were formed, Bean, Contrary, Sugar and Big Lakes are waters of this state within the definition of Section 306.010(7), RSMo Supp. 1982, for purposes of determining the jurisdiction of Missouri State Water Patrolmen for enforcement of Missouri statutes on those bodies of water. It is further the opinion of this office that it is at this time impossible to determine the ownership of the lake bed of South Lake, and therefore this office declines to issue a formal opinion with respect thereto.
<u>36-83</u>	Jan 20	APPROPRIATIONS. SCHOOL FOR THE DEAF. SCHOOL FOR THE	Appropriated funds from the School for the Blind Trust Fund, the School for the Deaf Trust Fund, and the Handicapped Children's Trust Fund, if not earmarked by the donor for a special purpose, may be used to provide operating money for the school to which

	BLIND. SCHOOLS FOR SEVERELY HANDICAPPED CHILDREN. STATE BOARD OF EDUCATION.		the funds were donated if the request for funds from general revenue has resulted in an appropriation from general revenue which is less than requested.
41-83	Jan 31		Opinion letter to Fred A. Lafser
42-83	June 1		Opinion letter to The Honorable James L. Mathewson
44-83	Feb 10	CONSTITUTIONAL LAW. FIRE PROTECTION DISTRICTS. HANCOCK AMENDMENT. TAXATION.	Article X, Section 22(a), Missouri Constitution, requires voter assent to a specific proposed fire protection district levy prior to the imposition of such a levy by a newly-formed fire protection district.
45-83	July 6		Opinion letter to Mr. Thomas J. Brown, III
46-83	Feb 28	COMPENSATION. COUNTIES. EX OFFICIO COLLECTORS. TOWNSHIP COLLECTORS. TOWNSHIPS.	In determining the compensation of an ex officio collector of a third class township county the total amount levied for any one year calculated under Section 54.320, RSMo Supp. 1982, does not include delinquent taxes.
48-83	Jan 21	UTILITIES. HANCOCK AMENDMENT. CONSTITUTIONAL LAW.	Article X, Section 22, Missouri Constitution, does not apply to private utility companies.
51-83			Withdrawn
57-83	June 30	ATHLETIC COMMISSION. BOXING. DEPARTMENT OF CONSUMER AFFAIRS, REGULATION AND LICENSING.	The Director of the Department of Consumer Affairs, Regulation and Licensing is required to regulate kick-boxing matches and exhibitions under the provisions of Chapter 317, RSMo.
61-83	Feb 24		Opinion letter to Dr. Arthur L. Mallory
67-83	Apr 7		Opinion letter to The Honorable Joe Moseley

69-83			Withdrawn
70-83	May 23		Opinion letter to The Honorable Roger B. Wilson
73-83	June 1	COUNTY COURTS. MILEAGE. SHERIFFS.	The 1982 repeal and reenactment of Section 57.430.1 authorizes county courts to increase the maximum allowable amount of sheriffs' and deputies' actual mileage expense reimbursement by two hundred dollars per calendar month. The additional two hundred dollars per month provision of this statute does not authorize payment in any amount above twenty cents per mile actually driven, nor does it authorize the payment of any compensation in addition to actual mileage reimbursement.
74-83	Mar 25		Opinion letter to Dr. Arthur L. Mallory
83-83	Sept 22	CONSTITUTIONAL LAW. HANCOCK AMENDMENT. PROPERTY TAX. REASSESSMENT. TAX LEVY. TAXATION-TAX RATE.	The words "new construction and improvements", as used in Article X, Section 22(a), Missouri Constitution, mean betterments to real property, including the creation of new structures and additions to, replacements of, or remodeling of existing structures, that occur subsequent to the last annual assessment date for such property; the county clerks and the assessor in the City of St. Louis determine when a rollback in tax rate is required by Article X, Section 22(a), Missouri Constitution.
88-83	May 23		Opinion letter to The Honorable David L. Rauch
90-83	Oct 21	ANNUAL LEAVE. COMPENSATION. SICK LEAVE PAYMENTS AND SICK LEAVE. STATE EMPLOYEES' RETIREMENT SYSTEM.	Officers who are compensated at specific rates pursuant to statute, e.g., official court reporters, do not accumulate sick leave pursuant to Section 36.350, RSMo Supp. 1982, and 1 CSR 20-5.020(2)(B). Accordingly, the State Courts Administrator need not certify any amount of unused sick leave pursuant to Section 104.601, RSMo Supp. 1982, for such court reporters.
93-83	July 18	COUNTY CONTRACTS. COUNTY COURTS. COUNTY JAILS. DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES. JAILERS. JAILS. PRISON.	Sheriffs may not contract out the operation of the county jails to private entities. The Department of Corrections and Human Resources may not contract out the operation of adult correctional facilities to private entities, except for the operation of halfway houses.
96-83	Aug 22		Opinion letter to The Honorable Claire McCaskill
97-83	Feb. 24, 1986 (Amended.)	DEPARTMENT OF REVENUE-DIRECTOR. PUBLIC RECORDS.	Personnel records of the Missouri Department of Revenue come within the definition of "public records" as defined in the Sunshine Law, but such records may be exempted from public disclosure or

		PERSONNEL. SUNSHINE LAW.	closed as required by law.
99-83	Aug 16	COMMUNITY MENTAL HEALTH CENTERS. COUNTIES. COUNTY FUNDS. COUNTY MENTAL HEALTH CLINIC. MENTAL HEALTH CLINIC.	A county treasurer is the custodian of a single county community mental health fund created or maintained pursuant to Section 205.980.2, RSMo 1978. The governing body of the county must issue warrants on such community mental health fund when presented with a voucher issued by the relevant community mental health fund board of trustees, unless (1) the voucher is not properly authenticated by the board or (2) the voucher shows on its face that it is issued for purposes other than those specified in Section 205.977, RSMo 1978.
101-83	Nov 28	TEACHERS AND TEACHERS RETIREMENT. TEACHERS TENURE.	The word "qualified" as used in Section 168.124(1), RSMo 1978, refers to teaching positions that permanent teachers are certified to teach and are otherwise capable of holding.
102-83	Sept 14	AMENDMENT OF STATUTES. COMPETITIVE BIDDING. STATE CANCER HOSPITAL. STATE PURCHASES. PURCHASING AGENT.	Direct purchases by the Ellis Fischel State Cancer Center are not subject to Chapter 34, RSMo.
106-83	June 14		Opinion letter to Mr. Robert J. Seek
107-83	June 6	BOARD OF PUBLIC BUILDINGS. BONDS.	The Board of Public Buildings has the authority pursuant to the provisions of Section 8.430, RSMo 1978, to issue refunding bonds in advance of the redemption call or maturity of the outstanding bonds to be refunded without further legislative authorization. The issuance of refunding bonds will not create an additional obligation of the Board for purposes of calculating the \$100,000,000 limitation on bonds of the Board imposed by Section 8.430. Refunding bonds may bear a rate of interest not to exceed fifteen percent pursuant to the provisions of Section 8.430 and shall have such terms and shall be sold in the manner provided by Sections 8.420, RSMo Supp. 1982, and 8.430.
109-83	July 28		Opinion letter to The Honorable Carole Roper Park
110-83	Nov 14		Opinion letter to The Honorable Joseph Treadway
113-83			Withdrawn

114-83	Oct 27	ABSENTEE VOTING. ELECTION BALLOTS. ELECTIONS. EXECUTING WITNESSES.	An executing witness, as provided for in Section 486.340, RSMo 1978, is neither a notary public nor an other officer authorized by law to administer oaths within the scope of Section 115.291.1, RSMo 1978. Therefore, the affidavit of a person voting an absentee ballot may not be subscribed and sworn to before an executing witness.
115-83	Aug 16	DEEDS OF TRUST. MORTGAGED PROPERTY. PROMISSORY NOTES. RECORDER OF DEEDS.	(1) A bank or trust company authorized to do a trust business need not be authorized to do a trust business in Missouri as a condition precedent to certifying pursuant to subsection 4 of Section 443.050, RSMo 1978, that a promissory note (or other instrument evidencing a debt) is the instrument or one of the instruments described in the deed of trust, mortgage, or other instrument securing such promissory note (or other instrument evidencing a debt), so long as the bank or trust company is authorized to do a trust business at the place where the certification occurs; and (2) if a mortgage, deed of trust, or other instrument intended to create a lien upon real estate to secure the payment of a debt or other obligation evidenced by an instrument or other instruments in writing is in proper form for recording and contains a provision in substantially the following form: "No promissory note (or other instrument evidencing a debt or other obligation) intended to be secured hereby shall be valid unless certified by a bank or trust company authorized to do a trust business to be the instrument or one of the instruments described in this deed of trust.", then a recorder of deeds in the State of Missouri may not require as a condition precedent to the recording of such mortgage, deed of trust, or other instrument either the presentment of (i) the note or other instrument or instruments representing the debt or obligation or any part thereof secured by such mortgage, deed of trust or other instrument or (ii) an executed copy of the certification by a bank or trust company in accordance with Section 443.050.4, RSMo 1978, the form of such certification or any other evidence that the note or other instrument or instruments evidencing the debt or obligation or any part thereof have in fact or will be so certified.
116-83	June 9	LAND RECLAMATION COMMISSION. MERIT SYSTEM. NATURAL RESOURCES, DEPARTMENT OF. OFFICERS.	Pursuant to Section 36.030.1, RSMo Supp. 1982, the employees of the Land Reclamation Commission are subject to the merit system provisions in Chapter 36, RSMo, with such exempt positions as may be provided for under subdivisions (1) through (10) of Section 36.030.1.

		REORGANIZATION ACT. STATE OFFICERS.	
117-83	June 9	ADMINISTRATION, COMMISSIONER OF. CONTRACTS. HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF. OFFICE OF ADMINISTRATION. PURCHASING AGENT.	The Commissioner of Administration has the responsibility to purchase data processing services and to purchase, rent, or lease data processing equipment for the Department of Highways and Transportation; the Department of Highways and Transportation may purchase, rent, or lease such equipment or services only if the Commissioner of Administration delegates such authority to the department pursuant to Section 34.100.
119-83	Aug 29	CAMPAIGN FINANCE REVIEW BOARD. ELECTIONS. PUBLIC RECORDS. RECORDS. SECRETARY OF STATE. SUNSHINE LAW.	Records of the Campaign Reporting Division of the Secretary of State's Office are open to inspection by the public.
121-83	July 7		Opinion letter to The Honorable Randall L. Robb
122-83	Dec 5	INSURANCE. INVESTMENT OF STATE RETIREMENT SYSTEM FUNDS. NONTEACHER SCHOOL EMPLOYEES' RETIREMENT SYSTEM. PUBLIC SCHOOL RETIREMENT SYSTEM. SECURITIES.	The Board of Trustees that administers The Public School Retirement System of Missouri and The Non-Teacher School Employee Retirement System of Missouri may not invest funds of these systems in direct equity ownership of real property for the purpose of producing income; such board may invest funds of these systems in pooled real estate investment funds for the purpose of producing income.
124-83	July 7	COUNTY BUILDINGS. COUNTY COURTS. COUNTY LEASES. COUNTY OFFICES.	The Boone County Court may purchase land which will serve as the site of a building to house county officeholders. The Boone County Court may temporarily lease such property to a private individual or corporation for its fair market value, if such lease will not interfere with the public use of this property.
127-83	July 11	CLEAN WATER COMMISSION. DEPARTMENT OF NATURAL RESOURCES. OIL & GAS COUNCIL. PERMITS.	Regulation 10 CSR 50-2.030 of the Missouri Oil and Gas Council provides adequate time for public participation procedures to be completed. The 15-day time period prescribed by 10 CSR 50-2.030(9) is directory. Failure of the State Geologist to act upon a permit application within 15 days does not result in automatic

		STATE GEOLOGIST. WATER POLLUTION. WATER SUPPLY. WELLS.	issuance of a permit. Chapter 259, RSMo 1978, provides adequate authority for the promulgation of regulations by the Missouri Oil and Gas Council to prevent the movement of fluids into underground sources of drinking water.
<u>129-83</u>	Oct 6	INDUSTRIAL DEVELOPMENT. INDUSTRIAL DEVELOPMENT BONDS. INDUSTRIAL DEVELOPMENT PROJECTS. INDUSTRIAL FACILITIES. NON-PROFIT CORPORATIONS. NON-PROFIT ORGANIZATIONS.	Non-profit retirement facilities do not come within the definition of the word "project" in Section 100.255(5), RSMo Supp. 1982; and non-profit retirement facilities do not come within the definition of the word "project" in Section 349.010(4), RSMo Supp. 1982.
<u>132-83</u>	Sept 6	DRIVER'S LICENSE. DRIVER'S LICENSE REVOCATION. DRIVING WHILE INTOXICATED. DEPARTMENT OF REVENUE. MOTOR VEHICLES.	The verified report described in Section 4 of C.C.S.H.C.S. S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session) is required only when the arresting officer describes the offense charged as a violation of Sections 577.010 or 577.012, RSMo 1978, that, pursuant to Section 3.1 of C.C.S.H.C. S.S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session) the department of revenue may not suspend the driver's license of a person based on the report of an arresting officer who describes the offense charged as a violation of county or municipal ordinance, and that the provisions of Section 577.023.13 [as amended by C.C.S.H.C.S.S.C.S.S.B. Nos. 318 and 135, (82nd General Assembly, 1st Regular Session)] do not prohibit a county or municipality from enacting an ordinance providing for enhanced punishment for a conviction of driving while intoxicated when the person charged has a prior municipal or county conviction for a similar offense.
<u>136-83</u>	Sept 30	CHILD PASSENGER RESTRAINT SYSTEMS. DEPARTMENT OF PUBLIC SAFETY. MOTOR VEHICLE EQUIPMENT. MOTOR VEHICLES. SCHOOL	House Bill No. 29, First Regular Session, 82nd General Assembly, does not require the installation of seat belts or child passenger restraint systems in school buses.

		TRANSPORTATION.	
200-83	Oct 21	HEALTH SERVICES CORPORATIONS. NOT-FOR-PROFIT CORPORATIONS. DENTAL BOARD. ELIGIBILITY TO OFFICE. QUALIFICATION FOR OFFICE.	Missouri Dental Service, Inc., a not-for-profit corporation doing business as a health services corporation, is not a business enterprise for purposes of Section 332.021 .2, RSMo Supp. 1982.
201-83	Aug 17		Opinion letter to The Honorable Richard P. Beard
204-83	Aug 30	SCHOOLS.	The phrase "inclement weather" as found in Section 171.033, RSMo Supp. 1982, includes days on which the weather is oppressively and extraordinarily hot. Under Section 160.041, RSMo 1978, a school district may not adopt an annual calendar designed to operate its schools on an "inclement weather" anticipation schedule by beginning daily sessions one hour later than usual and dismissing one hour earlier than usual, thereby providing for a school day of four hours. Decisions to adjust specific daily school schedules and operations under Section 160.041 must be made as actual weather facts and forecasts become available.
205-83	Sept 23	CITY COURTS. CITY, TOWNS AND VILLAGES. CITY CONTRACTS. VILLAGES. CITY JUDGE. COURT RULES. COURTHOUSE. COOPERATIVE AGREEMENTS.	A village organized pursuant to Chapter 80, RSMo 1978 and Supp. 1982, may hold hearings on municipal ordinance violations outside the corporate boundaries of the village and inside the corporate boundaries of a neighboring municipality, if (1) the village and municipality enter into a cooperative agreement regarding the operation of the courtroom to be used pursuant to Section 70.220, RSMo 1978, (2) the village expresses its consent to the promulgation of a local court rule by the relevant circuit court authorizing the filing and assignment of municipal division cases outside the boundaries of the village pursuant to Section 478.245, RSMo 1978, and (3) the circuit court promulgates such a rule.
207-83			Withdrawn
209-83	Oct 21	ANNUAL LEAVE. COMPENSATION. STATE OFFICERS.	Officials whose salary and compensation is specified in Section 105. 950, RSMo Supp. 1982, are not entitled to payment of accrued annual leave upon termination as department director.

<u>210-83</u>	Nov 17	DEPARTMENT OF CORRECTIONS. JAIL COMMITMENT. JAILS. PRISON. EMERGENCIES.	The Director of the Department of Corrections and Human Resources cannot as a part of his declaration of an "emergency" under Section 217.210, RSMo Supp. 1982, refuse to accept new commitments from the Circuit Courts of this State to the Division of Adult Institutions although the maximum capacity as set by the Director for population has been reached at each institution within the Division.
<u>219-83</u>	Oct 3		Opinion letter to Jane Bierdeman-Fike
<u>222-83</u>	Nov 14		Opinion letter to The Honorable Merrill Townley
<u>227-83</u>	Dec 29	NEWSPAPERS. LEGAL PUBLICATIONS.	A newspaper published as a weekly paper which converts to a daily paper may use the time published as a weekly paper together with the time published as a daily paper to satisfy the provision of Section 493.050, RSMo 1978, requiring a newspaper to have been published regularly and consecutively for a period of three years.
<u>228-83</u>	Oct 18		Opinion letter to The Honorable James C. Kirkpatrick
<u>229-83</u>	Dec 29	ABANDONED ROADS AND HIGHWAYS. COUNTY ROADS. PUBLIC ROADS. VACATING PUBLIC ROADS.	The county court of a third-class county must comply with Section 228.110, RSMo 1978, to vacate a county public road which has not been found to be abandoned. A county must maintain a public road to the level of funds available for that purpose.
<u>231-83</u>	Nov 7	CAMPAIGN FINANCE REVIEW BOARD. PUBLIC RECORDS. RECORDS. SUNSHINE LAW.	Pursuant to Section 130.066(5), RSMo 1978, Campaign Finance Review Board members and staff may not disclose the existence of an investigation prior to an election involving the candidate or committee under investigation or the details of an investigation at any time despite the fact that such information is available from some other officer or agency. It is further our opinion that the Campaign Finance Review Board begins its investigation for purposes of Section 130.066(5) and (6) upon undertaking a review of reports and statements filed with appropriate election officers, upon receipt of the sworn, written complaint of a citizen alleging a violation of Chapter 130, RSMo, or upon the receipt of the findings of the Secretary of State or other appropriate election officer.
<u>251-83</u>	Dec 22		Opinion letter to The Honorable E. J. Cantrell
<u>254-83</u>	Dec 20		Opinion letter to The Honorable Anthony D. Ribaudo

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JOHN ASHCROFT
ATTORNEY GENERAL

December 29, 1983

OPINION LETTER NO. 5-83

The Honorable John Dennis
Senator, District 27
Capitol Building, Room 418
Jefferson City, Missouri 65101

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Dear Senator Dennis:

This letter is in response to your question asking whether a county memorial hospital organized under the provisions of Sections 205.160 to 205.340 and 205.374, RSMo 1978, Supp. 1982, and Senate Bills Nos. 44 and 45, 1983 Mo. Legis. Service 721, 741 (Vernon's), may enter into a contract with a physician to employ the physician for a ten-year period.^{1/}

In our Opinion No. 92, dated July 28, 1961, to Volkmer, this office concluded that a county court may lease out real property of the county for short periods but may not enter into a lease for a period 99 or 20 years. This office concluded in that opinion that such an arrangement is tantamount to a permanent deprivation of possession which the legislature has directed will be by sale.

In our Opinion No. 304, dated November 9, 1965, to Kiser, this office concluded that county courts may execute leases, as lessee, for several years providing current and surplus funds on hand will be adequate to pay their obligations under the lease. Such opinion also concluded that county courts may execute a lease for multiple years that would be binding on succeeding courts,

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Section 205.190.4, RSMo Supp. 1982, states in part: "The board of hospital trustees shall have power to appoint a suitable chief executive officer and necessary assistants . . ." See also, Section 205.195, RSMo 1978, which regulates physician staff membership at county hospitals.

The Honorable John Dennis

providing that the contract is not for an unreasonable term or in bad faith or fraudulent. In concluding this office expressed a view that it appears that the county court might well execute a contract covering a period of two to five years (assuming validity in other areas) without too much question and it could possibly execute a valid contract for ten years depending on the particular facts. However, it appears that a lease in excess of 25 years, in such circumstances would be considered an unreasonable exercise of power under the facts.

We have enclosed copies of the cited opinions for your examination and information.

In answer to your question it appears likely that a ten-year contract with a physician for personal services would be excessive. The term of any such contract, assuming such contract is legal, could lawfully extend beyond the terms of the individual members of the board of hospital trustees. It is our view that a ten-year term could be in derogation of the powers of the future members of a board to govern the hospital properly.

In responding to your question, we note that there are at least two threshold questions which we do not purport to determine here. The first question is whether a contract of employment, as such, between the hospital board of trustees and any employee is possible in light of the holding of the Missouri Supreme Court in City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947). In that case, the Supreme Court concluded that:

Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative power by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. . . . Id. at 545.

Compare, however, Aslin v. Stoddard County, 106 S.W.2d 472 (Mo. 1937), where a division of the Missouri Supreme Court upheld a county court's one-year employment contract with a janitor, stating that the county court is a continuing body that can bind itself in the future.

The Honorable John Dennis

In addition, it has been held that multi-year public contracts may constitute an "indebtedness" in the sense of Article VI, Section 26(a), of the Missouri Constitution.^{2/} We note that the answer to the threshold questions that we raise herein have not been adequately resolved by the courts and for that reason, in the context of your question, we do not believe that it would be appropriate to try to resolve these or any other such threshold questions here.

If we are to assume the validity of such a contract, it is our view that the term of such should not extent beyond four years, which is the length of the terms of the hospital trustees, Section 205.170.3, RSMo 1978. We do not at this point pass upon the validity of any particular contract in any other respect.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures: Opinion No. 92, Volkmer, 1961
Opinion No. 304, Kiser, 1965

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Recently in St. Charles City-County Library District v. St. Charles Library Building Corporation, 627 S.W.2d 64 (Mo. App. 1981), the court indicated that if a long-term lease is subject to an annual option to terminate, the amount of the "debt" for purposes of the constitutional debt limitation is the total annual payments, not the total payments under the lease. It would be advisable for the draftsmen of any such employment agreement to consult the St. Charles City-County Library District opinion.

CIRCUIT COURT:
STATE AUDITOR:
STATE AGENCY:

Article IV, Section 13, Missouri Constitution, and Section 29.200,
RSMo 1978.

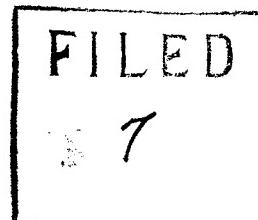
The State Auditor must audit
the accounts of the circuit
courts and all divisions of the
circuit courts pursuant to

September 9, 1983

OPINION NO. 7-83

The Honorable James F. Antonio, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101

Dear Dr. Antonio:



This is in response to your request for an opinion of this office on the following questions:

1. Is the State Auditor to audit the accounts of all circuit courts and all divisions of the circuit courts?
2. If the answer to question 1 is no, in counties which have a county auditor, is the county auditor to audit the accounts of the circuit court and divisions of the circuit court within that county?
3. If the answer to question 1 is no, is it legally permissible for a county court to hire a certified public accountant to audit the accounts of the circuit court and divisions of the circuit court within that county?

Article IV, Section 13, Missouri Constitution, states:

The state auditor shall have the same qualifications as the governor. He shall establish appropriate systems of accounting

The Honorable James F. Antonio, CPA

for all public officials of the state, post-audit the accounts of all state agencies and audit the treasury at least once annually. He shall make all other audits and investigations required by law, and shall make an annual report to the governor and general assembly. He shall establish appropriate systems of accounting for the political subdivisions of the state, supervise their budgeting systems, and audit their accounts as provided by law. No duty shall be imposed on him by law which is not related to the supervising and auditing of the receipt and expenditure of public funds. [Emphasis added.]

Section 29.200, RSMo 1978, states:

The state auditor shall postaudit the accounts of all state agencies and audit the treasury at least once annually. Once every two years, and when he deems it necessary, proper or expedient, the state auditor shall examine and postaudit the accounts of all appointive officers of the state and of institutions supported in whole or in part by the state. He shall audit any executive department or agency of the state upon the request of the governor. [Emphasis added.]

Section 29.230.1, RSMo Supp. 1982, states:

In every county which does not elect a county auditor, the state auditor shall audit, without cost to the county, at least once during the term for which any county officer is chosen, the accounts of the various county officers supported in whole or in part by public moneys. The audit shall be made as near the expiration of the term of office as the auditing force of the state auditor will permit. [Emphasis added.]

In Opinion No. 67-77, Keyes, 1977, this office concluded that clerks of courts of common pleas, magistrate courts, probate courts and the St. Louis Court of Criminal Corrections were county officers for purposes of Section 29.230, RSMo 1969. Because county auditors are elected in noncharter first and second class counties, Sections 55.040 and 55.050, RSMo 1978, and county officers, such as county auditors, are provided for by charter in first class charter counties, see Article VI, Section 18(b),

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Missouri Constitution, the effect of the 1977 opinion and Section 29.230.1, RSMo 1969, was to authorize the State Auditor to audit the accounts of "court clerks" only in third and fourth class counties. Since the issuance of our 1977 opinion, certain changes have been wrought by the adoption of C.C.S.S.J.R. 24, 1976 Mo. Laws 819 (adopted August 3, 1976; effective January 2, 1979), sometimes known as the "Judicial Article Amendment", and the Court Reform and Revision Act of 1978, H.B. 1634, 1978 Mo. Laws. 696. These changes have made the circuit courts agencies of the State of Missouri. Accounts of the circuit courts and all divisions of the circuit courts in the custody of officers or employees of the circuit courts, e.g., circuit and division clerks, are subject to audit pursuant to Article IV, Section 13, Missouri Constitution, and Section 29.200, RSMo 1978. Accordingly, our 1977 opinion is withdrawn.

The Judicial Article Amendment contains Article V, Section 1, Missouri Constitution, which states:

The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts.

Under this constitutional provision, the General Assembly is without authority to create local courts. See, **State Tax Commission v. Administrative Hearing Commission**, 641 S.W.2d 69, 76 (Mo. banc 1982).^{1/}

Article V, Section 15, Missouri Constitution, states:

1. The state shall be divided into convenient circuits of contiguous counties. In each circuit there shall be at least one circuit judge. The circuits may be changed or abolished by law as public convenience and the administration of justice may require, but no

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Prior to the adoption of the Judicial Article Amendment, Article V, Section 1, Missouri Constitution (as adopted pursuant to S.C.S.S.J.R. 16, 1969 Mo. Laws 588, 589) stated:

The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, circuit courts, probate courts, the St. Louis courts of criminal correction, the existing courts of common pleas, magistrate courts, and municipal corporation courts.

The Honorable James F. Antonio, CPA

judge shall be removed from office during his term by reason of alteration of the geographical boundaries of a circuit. Any circuit or associate circuit judge may temporarily sit in any other circuit at the request of a judge thereof. In circuits having more than one judge, the court may sit in general term or in divisions. The circuit judges of the circuit may make rules for the circuit not inconsistent with the rules of the supreme court.

2. Each circuit shall have such number of circuit judges as provided by law.

3. The circuit and associate circuit judges in each circuit shall select by secret ballot a circuit judge from their number to serve as presiding judge. The presiding judge shall have general administrative authority over the court and its divisions.

4. Personnel to aid in the business of the circuit court shall be selected as provided by law or in accordance with a governmental charter of a political subdivision of this state. Where there is a separate probate division of the circuit court, the judge of the probate division shall, until otherwise provided by law, appoint a clerk and other nonjudicial personnel for the probate division.

Sections 478.073 to 478.185, RSMo 1978 and Supp. 1982, divide the State of Missouri into forty-four judicial circuits. Most of these circuits contain more than one county. Although some of the statutes describing these judicial circuits divide the circuits into divisions, see, e.g., Section 478.513, RSMo 1978 (Greene County), we understand the reference to divisions in your question to be to divisions of the circuit courts that have specialized and limited jurisdiction, e.g., the juvenile divisions, Section 478.063, RSMo 1978, probate divisions, Section 478.260, RSMo 1978, small claims courts, Chapter 482, RSMo 1978 and Supp. 1982, and municipal divisions, Section 479.010 and 479.020.5, RSMo 1978.

Under this unified court system, there are only three types of courts -- the Supreme Court of Missouri, the Missouri Courts of Appeals, and the various circuit courts. Each of these types of courts is an agency of the State of Missouri vested with the State's judicial powers.

The Honorable James F. Antonio, CPA

Section 478.063, RSMo 1978, requires the circuits to designate a juvenile division of the circuit court. Section 478.260, RSMo 1978, establishes "a probate division of the circuit court" Section 482.300, RSMo 1978, provides for the maintenance of a separate "small claims" docket by each judge of a circuit court hearing small claims. Section 479.010, RSMo 1978, provides: "Violations of municipal ordinances shall be tried only before divisions of the circuit court as hereinafter provided in this chapter."

The language employed by the General Assembly in establishing each of the divisions of the circuit courts, including the juvenile, municipal, and probate divisions, shows a clear intent that each of the limited jurisdiction divisions is but a part of the circuit court. Because each such division is vested with elements of the State's judicial power pursuant to Article V, Section 1, Missouri Constitution, we believe the State Auditor's duty to audit extends to the circuit courts and all divisions thereof.

CONCLUSION

It is the opinion of this office that the State Auditor must audit the accounts of the circuit courts and all divisions of the circuit courts pursuant to Article IV, Section 13, Missouri Constitution, and Section 29.200, RSMo 1978.

Very truly yours,



JOHN ASHCROFT
Attorney General

COUNTY COLLECTOR: Taxes paid under protest as provided
COMPENSATION: in Section 139.031, RSMo 1978, are
PROTESTED TAXES: not considered collected for the
TAXATION: purpose of calculating the collector's
commissions as provided in Sections
52.250, 52.260, 52.270, RSMo 1978, until such taxes are disbursed
to the proper governmental entities. Statutes in effect at the
time the protested taxes were paid and impounded in a separate
account apply in determining the collector's compensation.

March 2, 1983

OPINION NO. 8-83

The Honorable James F. Antonio, C.P.A.
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This opinion is in response to your questions:

1. If taxes are paid under protest and impounded in a separate fund as provided in Section 139.031.2, RSMo 1978, is a county collector in a third class, nontownship county entitled to his commission for mailing statements, as authorized by Section 52.250, RSMo 1978, on such taxes when the money is paid into the separate fund or when the money is distributed from the fund?

2. If taxes are paid under protest and impounded in a separate fund as provided in Section 139.031.2 RSMo 1978, is a county collector in a third class, nontownship county entitled to his current commission, as authorized by Section 52.260, RSMo 1978, on such taxes when the money is paid into the separate fund or when the money is distributed from the fund?

The Honorable James F. Antonio, C.P.A.

3. For purposes of determining if a collector in a third class, nontownship county has exceeded the ceiling on commissions for mailing statements imposed by Section 52.250, RSMo 1978, are commissions on taxes paid under protest and impounded in a separate fund attributed to the year in which the protested taxes are paid into the separate fund or to the year in which the protested taxes are distributed from the separate fund?

4. For purposes of determining if a collector in a third class, nontownship county has exceeded the ceiling on current commissions imposed by Section 52.270, RSMo 1978, are commissions on taxes paid under protest and impounded in a separate fund attributed to the year in which the protested taxes are paid into the separate fund or to the year in which the protested taxes are distributed from the separate fund?

5. What amount of commissions is the [collector in a third class, nontownship county] entitled to retain on \$821,902 of taxes paid under protest in 1978, which amount was impounded in a separate fund until November, 1979 at which time \$436,212 was distributed to the appropriate governmental entities and \$385,690 was returned to the taxpayer?

Because your fifth question relates to specific facts, we respectfully decline to answer it. However, we are confident that the principles upon which we base our answers to your first four questions will provide adequate direction in determining the proper commissions.

Your questions relate to a third class county not having township organization, in which the collector of revenue is not required to maintain a branch office under Section 52.120, RSMo 1978. During the 1978 tax year, a taxpayer protested the payment of \$821,902 in real estate taxes as provided in Section 139.031.1, RSMo 1978. That sum was impounded in a separate fund by the county collector as provided in Section 139.031.2, RSMo 1978. In November of 1979, the circuit court determined that \$436,212 of the impounded taxes should be disbursed; the remaining \$385,690 was refunded to the taxpayer.

The Honorable James F. Antonio, C.P.A.

Sections 52.250, 52.260 and 52.270, RSMo 1978, govern the calculation of a third class county collector's mailing and collecting commissions.

We note that C.C.S.S.B. 9 (79th General Assembly, First Regular Session, 1977), effective March 5, 1979, amended Sections 52.250, 52.260 and 52.270, RSMo. Without discussing in detail the changes wrought by C.C.S.S.B. 9, it is sufficient to say that the taxes paid under protest were paid and impounded prior to the adoption of C.C.S.S.B. 9, while the final determination of actual tax liability and disbursement of taxes took place after March 5, 1979.

Section 52.250, RSMo 1978, states in pertinent part:

The collectors in third class counties shall receive one-half of one percent . . . of all current taxes collected, including current delinquent taxes, exclusive of all current railroad and utility taxes collected, as compensation for mailing said statements and receipts. Said compensation shall not exceed ten thousand dollars per year . . . [Emphasis added.]

Section 52.260, RSMo 1978, as applied to a third-class, non-township county, states in pertinent part:

The collector in counties not having township organization, . . . shall collect and retain the following commissions for collecting all state, county, bridge, road, school, back and delinquent, and all other local taxes, including merchants', manufacturers' and liquor and beer licenses, other than ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees:

* * *

(3) In all counties wherein the total amount levied for any one year exceeds two million dollars, a commission of one percent on the amounts collected. [Emphasis added.]

Section 52.270.2, RSMo 1978, states:

The Honorable James F. Antonio, C.P.A.

The collector of revenue in any county within the classification of subdivision (3) of section 52.260 shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting the revenue, which shall be allowed as against the commissions collected by him; and out of the residue of commissions in his hands after deducting the amounts so allowed, the collector may retain a compensation for his services at the rate of ten thousand dollars per year. If the residue of commissions is less than sufficient to pay the above compensation, the entire residue shall be allowed to him as full payment for his services. If the residue is more than sufficient to pay the compensation, the surplus shall be paid over to the county. [Emphasis added.]

The language of the above statutes indicates that the county collector is entitled to commissions on the amount of taxes "collected" and for "collecting" certain taxes. Therefore, in addressing your first and second questions, the determinative issue is whether taxes paid under protest are collected for the purpose of calculating commissions due under Sections 52.250, 52.260 and 52.270, at the time of payment of the protested taxes or at the time of disbursement of the protested taxes to the proper officials.

Under Section 139.031.1, the taxpayer must file with the collector a written statement setting forth the grounds on which his protest is based. The collector issues the protesting taxpayer a receipt for the taxes paid, noting thereon that the taxes are being paid under protest. Section 139.090, RSMo Supp. 1982; Opinion No. 73, Holt, January 9, 1970. The collector is required to impound the protested taxes in a separate fund. Section 139.031.2. Within 90 days, the taxpayer must file an action against the collector for a tax refund in the circuit court of the county in which the collector maintains his office. Section 139.031.2; Xerox Corporation v. Travers, 529 S.W.2d 418, 422 (Mo. banc 1975). If the taxpayer commences such an action, a court order finalizing the proceeding is a condition precedent to the disbursement of the impounded funds. In other words, the collector may not disburse or refund the impounded funds until the protest proceeding is completed. Section 139.031.3; Xerox Corporation v. Travers, supra; State ex rel. Crawford County R-II School District v. Bouse, 586 S.W.2d 61, 66 (Mo.App. 1979).

The Honorable James F. Antonio, C.P.A.

We believe that taxes paid under protest are not "collected" taxes within the purview of Sections 52.250, 52.260 and 52.270. In James v. Consolidated Steel Corporation, Ltd., 195 S.W.2d 955 (Tx.App. 1946), the court held:

Whereas, under the protest statute, the State Treasurer is required to place such payments in a suspense account to await the outcome of the adjudication . . . where such suit is filed as therein provided. Unless and until such judicial determination is made, such payments cannot, in legal contemplation, be deemed to be taxes collected. . . . Id. at 961.

See also, Roles v. Earle, 195 F.2d 346 (9th Cir. 1952).

We agree with the holding in the James case. Tax funds paid under protest and impounded pursuant to Section 139.031 are not "collected" for the purpose of calculating the collector's commissions until such funds are disbursed to the proper officials. Such a conclusion is entirely logical. The amount of the protested taxes to be distributed to the governmental entities cannot be determined until such funds are disbursed pursuant to a court order or as otherwise provided in Section 139.031.

With regard to your third question, we are of the opinion that the law in effect when the collector mailed tax statements controls the amount of commission which the collector may receive.

The fact situation you present is an unusual one. The county collector mailed his tax statements prior to the effective date of an amendment to the law regarding mailing commissions, and because of a protest filed by a taxpayer, final determination of the proper tax liability did not take place until after the effective date of that amendment. Further, the new law placed a ceiling on the mailing commissions which the collector could receive; that ceiling did not exist when the collector mailed the tax statements which generated the protested tax payment.

Section 52.230, RSMo 1978, requires inter alia, the collector to mail tax statements to all resident taxpayers each year at least fifteen days prior to the delinquent date for the tax. Section 52.250 provides that collectors in third class counties shall receive one-half of one percent of all current taxes collected, "as compensation for mailing said statements and receipts. . . ." [Emphasis added].

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Clearly, once the final tax statement is mailed pursuant to Section 52.230, the collector has completed all of the work required to earn the commission. The mere fact that the amount of the commission cannot be determined until a protest is decided does not require the mailing commission to be credited in another tax year.

While we have found no Missouri authority which directly addresses your third question, we believe cases regarding successor collector issues are instructive for purpose of determining the proper law under which commissions are earned. In Douglass v. Ray, 199 S.W. 568 (Mo.App. 1917), the Springfield Court of Appeals ruled that where a collector filed suit to collect a delinquent tax and the payment of that tax was received by his successor, the commission properly should be paid to the collector who filed the action to receive the tax.

Similarly, in Kirkpatrick v. Rose, 344 S.W.2d 59 (Mo. 1961), the Supreme Court held that when a collector died in office, having performed ninety percent of the mailing duties, his estate was entitled to ninety percent of the commission for taxes collected, pursuant to Section 52.250, RSMo. The court stated:

This [mailing commission] is for the labor, time, and expense incurred in the performance of the extra duties imposed, and the natural legislative intent would be to reimburse and compensate the one who paid the expense and discharged the duties. . . . Id. at 63-64.

The labor and expense provided by the collector is for a given year. It is only proper to reimburse the collector according to the law in effect in the year in which the expense is made.

To hold otherwise, particularly in the face of a subsequently imposed ceiling for mailing commissions, would result in penalizing the collector whenever a tax was paid under protest. If the mailing commission ultimately received upon resolution of the protest counted against the ceiling in the year in which the protest is resolved (assuming a different tax year), the collector would not be reimbursed for his labor and expenses in the year in which the mailing commissions were earned. Further, if the amount of the protested tax was large, as in the fact situation you pose, to credit the commission received for past year's tax against a current year's commissions would diminish the compensation which the collector could receive for the current year's expenses and labor. We do not believe such an inequitable result was contemplated by the General Assembly when it amended Section 52.250.

The Honorable James F. Antonio, C.P.A.

In answer to your fourth question, we hold that commissions earned on taxes paid under protest must be attributed to the year in which the protested taxes were paid under protest, not to the year in which the funds were distributed following resolution of the protest, for purposes of computing a collector's commission pursuant to Section 52.260.2. This answer is based on and consistent with the reasoning employed in our answer to your third question.

CONCLUSION

It is the opinion of this office that taxes paid under protest as provided in Section 139.031, RSMo 1978, are not considered collected for the purpose of calculating the collector's commissions as provided in Sections 52.250, 52.260 and 52.270, RSMo 1978, until such taxes are disbursed to the proper governmental entities. However, the statutes in effect at the time the protested taxes were paid and impounded in a separate account apply in determining the collector's compensation.

Very truly yours,



JOHN ASHCROFT
Attorney General

CIRCUIT COURT: An official court reporter is not entitled to additional compensation
COMPENSATION:
COUNTY COURT:
COURT REPORTER: for the transcription of grand jury evidentiary proceedings for the use of the prosecuting attorney pursuant to an order of a circuit judge under Section 540.105, RSMo 1978.

September 29, 1983

OPINION NO. 9-83

Mr. Steven E. Raymond
Shelby County Prosecuting Attorney
Shelby County Courthouse
Shelbyville, Missouri 63469

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Dear Mr. Raymond:

This opinion is in response to questions asked by the Honorable Billy G. Moore, Presiding Judge of the Shelby County Court. These questions are as follows:

- A. If the judge of the circuit court directs the official reporter of the circuit court to transcribe any and all evidence given before the grand jury, as provided in Section 540.105, is the official reporter of the circuit court allowed a transcript fee for any original transcripts, or copies thereof?
- B. If the answer to question A is yes, who is required to pay the transcript fee, and at what rate?

This opinion request also states:

The official reporter of the circuit court, 41st Circuit, transcribed all evidence relating to grand jury proceedings, as ordered by the judge of the circuit court. The official reporter of the circuit court subsequently billed the Shelby County Court for original transcripts and copies thereof, at a rate of \$1.50 per page per original and \$.50 per page per copy. The Shelby County Court is uncer-

Mr. Steven E. Raymond

tain as to its obligation to pay the reporter of the Circuit Court for these original transcripts and copies. In addition, the Shelby County Court is uncertain as to the rates which should be charged by the reporter of the circuit court for original transcripts and copies.

The common-law rules regarding the right of public officials to receive compensation have been summarized in *Nodaway County v. Kidder*, 344 Mo. 795, 801, 129 S.W.2d 857, 860 (1939), as follows:

The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. . . . [citations omitted.]

It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. . . . [citations omitted.]^{1/}

An official court reporter is an officer of the state. *State v. Mitchell*, 267 S.W. 873 (Mo. 1924).

Section 540.105, RSMo 1978,^{2/} provides in pertinent part:

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In *State ex rel. Hall v. Bauman*, 466 S.W.2d 177, 180 (Mo. App. 1971), the court held that the rule requiring the strict construction of compensation statutes against the public officer applies only where additional compensation is sought and does not apply where there would be a complete denial of compensation.

Court reporters receive a salary of \$23,790 plus a salary adjustment. Section 485.060, RSMo Supp. 1982. Therefore, the strict construction rule applies here.

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All statutory references are to RSMo 1978, unless otherwise indicated.

Mr. Steven E. Raymond

The official reporter of the circuit court, when directed by the judge thereof, shall take down and transcribe for the use of the prosecuting attorney any or all evidence given before the grand jury. . . . [Emphasis added.]

Section 485.050 provides in pertinent part:

It shall be the duty of the official court reporter . . . ; to take full stenographic notes of the oral evidence offered in every cause tried in said court, . . . ; to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee herein provided.

Section 485.100 describes the fees due a court reporter for performing the duties described in Section 485.050, as follows:

For all transcripts of testimony given or proceedings had in any circuit court, the court reporter shall receive the sum of seventy cents per twenty-five line page for the original of the transcript, and the sum of twenty cents per twenty-five line page for each carbon copy thereof; the page to be approximately eight and one-half inches by eleven inches in size, with left-hand margin of approximately one and one-half inches and the right-hand margin of approximately one-half inch; answer to follow question on same line when feasible; such page to be designated as a legal page. Any judge, in his discretion, may order a transcript of all or any part of the evidence or oral proceedings, and the court reporter's fees for making the same shall be paid by the county until June 30, 1979, upon a voucher approved by the court, and taxed against the state or county as may be proper. . . . From and after July 1, 1979, the payment of court reporter's fees provided in this section to be paid by the county before that date shall be made by the state upon similar voucher approval. [Emphasis added.]

Mr. Steven E. Raymond

Section 540.105 imposes two mandatory duties upon a court reporter -- to "take down" and to "transcribe" evidence given to the grand jury. **State ex rel. Dunlap v. Hanna**, 561 S.W.2d 411, 413 (Mo. App. 1977). These duties are in contradistinction to the separate duties imposed by Chapter 485 -- to "take full stenographic notes", which is mandatory, "and furnish to any person . . . a transcript . . . upon payment", which is conditional. In the latter instance, transcription is conditioned upon payment, whereas in the former, transcription is mandatory. "[T]ranscription follows as a matter of course the order to take down the evidence." **Hanna, supra**, at 413.

Section 485.100 cannot be read in a vacuum. As we have earlier indicated, Section 485.100 describes fees for the transcription of circuit court proceedings, the note of which must be preserved pursuant to Section 485.050. There is no such requirement for grand jury proceedings; Missouri law does not require the stenographic recording of grand jury evidence. **State v. Greer**, 605 S.W.2d 93 (Mo. 1980), vacated, 451 U.S. 1013 (1981), relevant part affirmed on remand, 619 S.W.2d 65 (Mo. banc 1981). Only upon order of the circuit judge pursuant to Section 540.105 (or of the prosecuting attorney of a first class county, Section 56.190) is a transcript made.

We believe that the duties imposed on court reporters by Section 540.105 are distinct from those established pursuant to Chapter 485. Thus, we believe the fees permitted under Section 485.100 are not payable for the performance of duties undertaken by a court reporter pursuant to a circuit judge's order issued under Section 540.105.

Because we are constrained to construe compensation questions strictly against public officers, **Kidder, supra**, in the absence of specific statutory authorization, it is our opinion that an official court reporter is not entitled to additional compensation for the transcription of grand jury evidentiary proceedings for the use of the prosecuting attorney undertaken pursuant to an order of a circuit judge under Section 540.105.

In view of our answer to your first question, a response to your second question is not necessary.

Mr. Steven E. Raymond

CONCLUSION

It is the opinion of this office that an official court reporter is not entitled to additional compensation for the transcription of grand jury evidentiary proceedings for the use of the prosecuting attorney pursuant to an order of a circuit judge under Section 540.105, RSMo 1978.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

June 22, 1983

OPINION LETTER NO. 11-83

(corrected)

Barrett A. Toan, Director
Department of Social Services
Post Office Box 1527
Jefferson City, Missouri 65102



Dear Mr. Toan:

You have requested our legal opinion on the following question:

Is a hospital employed Mobile Emergency Medical Technician authorized to perform the procedures delineated in Section 190.140 RSMo. in a hospital emergency room when so directed by a physician or a registered nurse?

Section 190.140, RSMo 1978, reads in its entirety:

Notwithstanding any other provision of sections 190.100 to 190.195, mobile emergency medical technicians may do any of the following at the scene of the accident in an ambulance or at the emergency room of a licensed hospital:

- (1) Render rescue, first-aid and resuscitation services;
- (2) Perform cardiopulmonary resuscitation and defibrillation in a pulseless, nonbreathing patient;
- (3) During training at the hospital and while caring for patients in the hospital administer parenteral medications under the direct supervision of a physician or a registered nurse; and

(4) Where voice contact or a telemetered electrocardiogram is monitored by a physician or a registered nurse authorized by a physician, and direct communication is maintained, mobile emergency medical technicians may upon order of such licensed physician or such licensed registered nurse do any of the following:

- (a) Administer intravenous saline or glucose solutions;
- (b) Perform gastric suction by intubation;
- (c) Perform endotracheal intubation; and
- (d) Administer parenteral injections of any of the following classes of drugs:
 - a. Antiarrhythmic agents;
 - b. Vagolytic agents;
 - c. Chronotropic agents;
 - d. Analgesic agents;
 - e. Alkalinating agents;
 - f. Vasopressor agents; and
 - g. Other drugs which may be deemed necessary by such ordering physician;

(5) Deliver emergency medical care to the sick and injured while in the emergency department of a licensed hospital and until care responsibility is assumed by a licensed physician or a licensed registered nurse.

We interpret Section 190.140 to authorize mobile emergency medical technicians to take the actions described in clauses (1) and (2) in a hospital emergency room without supervision or direction from a physician or registered nurse, and to take the actions described in clause (4) in a hospital emergency room when in direct communication with, and ordered to do so, by a physician or a duly authorized registered nurse. We understand clause (5) to mean that mobile emergency medical technicians can render emergency medical care in a hospital emergency room without supervision or direction by a licensed physician or a licensed registered nurse until such time as a physician or registered

Barrett A. Toan, Director

nurse assumes care responsibility for the patient directly relieving the mobile emergency medical technician of responsibility for attending a patient.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

September 27, 1983

OPINION LETTER NO. 12-83

The Honorable James L. Mathewson
Senator, District 21
Room 432, State Capitol
Jefferson City, Missouri 65101

Dear Senator Mathewson:

This is in response to your request for an opinion as follows:

I want to know the legality of Civil Defense Director and Deputy Director using red lights and sirens in emergency situations.

Section 307.095, RSMo 1978, provides:

Headlamps, when lighted, shall exhibit lights substantially white in color; auxiliary lamps, cowllamps and spotlamps, when lighted, shall exhibit lights substantially white, yellow or amber in color. No person shall drive or move any vehicle or equipment, except a school bus when used for school purposes or an emergency vehicle upon any street or highway with any lamp or device thereon displaying a red light visible from directly in front thereof. [Emphasis added.]

Section 304.022.3(1)-(4), RSMo Supp. 1982, defines an "emergency vehicle" as:

(1) A vehicle operated as an ambulance, or a vehicle operated by the state highway patrol, police or fire department, sheriff, constable or deputy sheriff, traffic officer or coroner;

(2) Any vehicle qualifying as an emergency vehicle under section 307.175, RSMo;

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The Honorable James L. Mathewson

(3) Any wrecker, or tow truck or a vehicle owned and operated by a public utility or public service corporation while performing emergency service;

(4) Any vehicle transporting equipment designed to extricate human beings from the wreckage of a motor vehicle.

We find no authority in the law for a Civil Defense Director or a Deputy Director to use red lights and sirens in emergency situations.

We note that Section 307.175, RSMo Supp. 1982, provides:

Motor vehicles and equipment which are operated by any member of an organized fire department, ambulance association, or rescue squad, whether paid or volunteer, may be operated on streets and highways in this state as an emergency vehicle under the provisions of section 304.022, RSMo, while responding to a fire call or ambulance call or at the scene of a fire call or ambulance call and while using or sounding a warning siren and while using or displaying thereon fixed, flashing or rotating blue lights, but sirens and blue lights shall be used only in bona fide emergencies. Permits for the operation of such vehicles equipped with sirens or blue lights shall be in writing and shall be issued and may be revoked by the chief of an organized fire department, organized ambulance association, or rescue squad and no person shall use or display a siren or blue lights on a motor vehicle, fire, ambulance, or rescue equipment without a valid permit authorizing the use. Permit to use a siren or lights as heretofore set out does not relieve the operator of the vehicle so equipped with complying with all other traffic laws and regulations. Violation of this section constitutes a class A misdemeanor.

Pursuant to Section 44.080.2(2), RSMo 1978, political subdivisions are authorized to provide for auxiliary fire and police personnel or other emergency operation units or teams. To the extent that a Civil Defense Director or Deputy Director is a bona fide member of any auxiliary police or fire force or rescue squad and holds a valid permit from the chief of the relevant emergency response unit, the provisions of Section 307.175 apply. See,

The Honorable James L. Mathewson

Opinion No. 152-72, Grellner, 1972 (attached). However, it is our opinion that a Civil Defense Director or Deputy Director may not employ red lights or sirens in emergency situations solely on the basis of his or her status as a Civil Defense Director or Deputy Director.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 152-72

COUNTIES:
COUNTY ROAD AND BRIDGE FUND:
COUNTY SALES TAX:
COUNTY COURTS:

(1) The tax levy authorized by the first sentence of Article X, Section 12(a), Missouri Constitution, and Section 137.555, RSMo 1978,

is part of the "total property tax levy" as that phrase is defined in Section 67.500(5), RSMo Supp. 1982, and is subject to the County Sales Tax Act roll back. Four-fifths of the funds generated by this levy from property in a special road district are credited to the special road district and are excluded from the calculation of the County Sales Tax Act roll back pursuant to Section 67.505.3, RSMo Supp. 1982. (2) The levy authorized by the second sentence of Article X, Section 12(a), Missouri Constitution, and Sections 137.565 to 137.575, RSMo 1978, is not part of the "total property tax levy" as that phrase is defined in Section 67.500(5), RSMo Supp. 1982, and is not subject to the County Sales Tax Act roll back. (3) Counties are not authorized to grant county sales tax revenues to special road districts. (4) General road districts are those organized pursuant to Section 231.010, RSMo 1978.

July 7, 1983

OPINION NO. 14-83

The Honorable Joe Moseley
Boone County Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201

FILED
14

Dear Mr. Moseley:

You have requested an opinion of this office on the following questions:

Assuming that a second class county has adopted a county sales tas [tax] pursuant to Sec. 67.500 et seq., and,

Assuming that within that county there exists a special road district organized under chapter 233.010 to 233.165:

1. If voters have approved an increase above 35 cents on each hundred dollar assessed valuation for the general road and bridge fund (Article 10, Sec. 12(a) first sentence) is the amount of tax collected above the 35 cents figure subject to roll back pursuant to Sec. 67.505.

The Honorable Joe Noseley

2. If voters of a special road district (233.010 - 233.165) have authorized an additional levy pursuant to Article 10 Sec. 12(a) second sentence, is any of that levy subject to roll back pursuant to Sec. 67.505.
3. Is it permissible for the county to distribute funds collected pursuant to a county wide sales-tax (Sec. 67.505) to a special road district.
4. If number 3 is yes, and a special road district receives sales tax from the county, then must the special road district roll back its property tax collected pursuant to Article 10, Sec. 12(a) (second sentence).
5. What is the meaning of the word "general" as used in the phrase "of any road district, general or special" in the second sentence of Article 10 Sec. 12(a).

Article X, Section 12(a), Missouri Constitution, states:

In addition to the rates authorized in section II [sic] for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding fifty cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes; provided that, before any such county may increase its tax levy for road and bridge purposes above thirty-five cents it must submit such increase to the qualified voters of that county at a general or special election and receive the approval of a majority of the voters voting on such increase. In addition to the above levy for road and bridge purposes, it shall be the duty of the county court, when so authorized by a majority of the qualified electors of any road district, general or special, voting thereon at an election held for such purpose, to make an additional levy of not to exceed thirty-five cents on the hundred dollars

The Honorable Joe Moseley

assessed valuation on all taxable real and tangible personal property within such district, to be collected in the same manner as state and county taxes, and placed to the credit of the road district authorizing such levy, such election to be called and held in the manner provided by law provided that the general assembly may require by law that the rates authorized herein may be reduced. [Emphasis added.]

Section 137.555, RSMo 1978,^{1/} states:

In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as "The Special Road and Bridge Fund" to be used for road and bridge purposes and for no other purpose whatever; provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any special road district shall be paid into the county treasury and four-fifths of such part or portion of said tax so arising from and collected and paid upon any property lying and being within any such special road district shall be placed to the credit of such special road district from which it arose and shall be paid out to such special road district upon warrants of the county court, in favor of the commissioners or treasurer of the district as the case may be; provided further, that the part of said special road and bridge tax arising from and paid upon property not situated in any special road district and the one-fifth part retained in the county treasury may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a

^{1/}All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable Joe Moseley

continuous highway of said county leading through such city or village. [Emphasis added.]

In Opinion No. 129, Lybyer, 1979, copy enclosed, we concluded that Article X, Section 12(a), is self-enforcing and that the thirty-five cents limit in Section 137.585 must yield to this constitutional authorization of a fifty cents levy. A like result is reached under Section 137.555. However, nothing herein should be read as "repealing" the provision of Section 137.555 requiring the transfer of four-fifths of the additional tax arising from property lying in any special road district to such special road district.

Section 67.505.3, RSMo Supp. 1982, which is part of the County Sales Tax Act, states in part:

Each year in which a sales tax is imposed under the provisions of sections 67.500 to 67.545, the county shall, after determining its budget, excluding funds required to be set aside and placed to the credit of special road districts, within the limits set by the constitution and laws of this state for the following calendar year and the total property tax levy needed to raise the revenues required by such budget, reduce that total property tax levy in an amount sufficient to decrease the total property taxes it will collect by an amount equal to one of the following:

- (1) Fifty percent of the sales tax revenue collected in the tax year for which the property taxes are being levied;
- (2) Sixty percent of the sales tax revenue collected in the tax year for which the property taxes are being levied;
- (3) Seventy percent of the sales tax revenue collected in the tax year for which the property taxes are being levied;
- (4) Eighty percent of the sales tax revenue collected in the tax year for which the property taxes are being levied;
- (5) Ninety percent of the sales tax revenue collected in the tax year for which the property taxes are being levied;
- (6) One hundred percent of the sales tax revenue collected in the tax year for which the property taxes are being levied;

The Honorable Joe Roseley

Provided that, in the event that the immediately preceding year a county actually collected more or less sales tax revenue than the amount determined under subdivision (4) of section 67.500, the county shall adjust its total property tax levy for the current year to reflect such increase or decrease. [Emphasis added.]

Section 67.500(5), RSMo Supp. 1982, defines "total property tax levy" to include:

[A]ll those ad valorem taxes which counties have the authority to levy on all classes of property, except those ad valorem taxes originally requiring voter approval and those taxes levied to retire indebtedness, plus an allowance for ad valorem taxes which will be billed but not collected in the calendar year. The individual tax rates of these ad valorem taxes shall not exceed the amounts allowed to be levied without voter approval by the constitution and laws of this state unless the voters have approved that rate of levy. [Emphasis added.]

The additional levy authorized by the first sentence in Article X, Section 12(a), and Section 137.555 may be imposed at a rate up to thirty-five cents on each hundred dollars of assessed valuation without voter approval; if this levy is increased above thirty-five cents on each hundred dollars assessed valuation, the increase must be approved by the voters. Therefore, this levy, whether above, at, or below the thirty-five cents level, is not one originally requiring voter approval, and is part of the "total property tax levy" under the definition of that term in Section 67.500(5), RSMo Supp. 1982. However, four-fifths of this levy derived from property within any special road district is transferred to such special road district pursuant to Section 137.555. This "four-fifths" money is excluded from the calculation of the County Sales Tax Act roll back pursuant to Section 67.505.3, RSMo Supp. 1982.

The tax authorized pursuant to the second sentence of Article X, Section 12(a), and Sections 137.565 to 137.575 is one originally requiring voter approval; this tax is not part of the "total property tax levy" as that phrase is defined pursuant to Section 67.500(5), RSMo Supp. 1982. Therefore, no part of this levy is subject to the County Sales Tax Act roll back.

In response to your third question, we are aware of no statutes authorizing counties to grant county sales tax revenues to special road districts. In the absence of specific authority, such a grant is not permissible. This conclusion is supported by Section 50.550, which prohibits counties from budgeting grants for the repair and upkeep of bridges in special road districts.

The Honorable Joe Moseley

Our response to your third question is "no"; therefore, we will not discuss your fourth question.

In response to your fifth question, we believe general road districts are those organized pursuant to Section 231.010. See, State ex rel. Moore v. Wabash R. Co., 208 S.W.2d 223 (Mo. 1948).

CONCLUSIONS

1. The tax levy authorized by the first sentence of Article X, Section 12(a), Missouri Constitution, and Section 137.555, RSMo 1978, is part of the "total property tax levy" as that phrase is defined in Section 67.500(5), RSMo Supp. 1982. Therefore, this levy is subject to the County Sales Tax Act roll back. Four-fifths of the funds generated by this levy from property in a special road district are credited to the special road district and are excluded from the calculation of the County Sales Tax Act roll back pursuant to Section 67.505.3, RSMo Supp. 1982.

2. The levy authorized by the second sentence of Article X, Section 12(a), Missouri Constitution, and Sections 137.565 to 137.575, RSMo 1978, is not part of the "total property tax levy" as that phrase is defined in Section 67.500(5), RSMo Supp. 1982. Therefore, this levy is not subject to the County Sales Tax Act roll back.

3. Counties are not authorized to grant county sales tax revenues to special road districts.

4. General road districts are those organized pursuant to Section 231.010, RSMo 1978.

Very truly yours,


JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 129, Lybyer, 1979

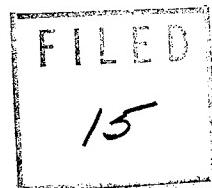
DEPARTMENT OF MENTAL HEALTH:
HANDICAPPED CHILDREN-PERSONS:
MENTAL ILLNESS:
MENTAL PATIENTS:
MENTAL RETARDATION:
MENTALLY DISTURBED CHILDREN:

The Department of Mental Health does not have authority to expend state funds for the placement of mentally disordered patients outside the State of Missouri.

September 19, 1983

OPINION NO. 15-83

Paul R. Ahr, Ph.D., M.P.A.
Director
Department of Mental Health
2002 Missouri Boulevard
Jefferson City, Missouri 65101



Dear Dr. Ahr:

This is in response to your request for an official opinion of this office on the following question:

Does the Department of Mental Health have the authority to expend monies appropriated to it by the General Assembly for the purpose of funding the placement of mentally disordered patients out of the State of Missouri?

We understand your question to be limited to instances where the patient's home is in the State of Missouri.

In Opinion No. 70-79, Wilson, 1979, copy enclosed, this office considered Sections 202.185, 202.193, and 202.880, Article III(b), RSMo 1978 (repealed), and found that no statutory authority existed for the Department of Mental Health to place patients outside the State of Missouri.

Since the issuance of Opinion No. 70-79, the General Assembly has repealed the statutes considered therein and has enacted C.C.S.H.B. 1724, 1980 Mo. Laws 503. The applicable statutes now are as follows:

Paul R. Ahr., Ph.D., M.P.A.

Section 630.605, RSMo Supp. 1982,^{1/} states:

The department shall establish a placement program for persons affected by a mental disorder, mental illness, mental retardation, developmental disability or alcohol or drug abuse. The department may utilize residential facilities, day programs and specialized services which are designed to maintain a person who is accepted in the placement program in the least restrictive environment in accordance with the person's individualized treatment, habilitation or rehabilitation plan. The department shall license, certify and, subject to appropriations, a continuum of facilities, programs and services short of admission to a department facility to accomplish this purpose.

Section 630.620 states:

1. The department may place any patient or resident referred by a department facility or any person applying directly or referred under section 630.610 who is accepted for placement, in one or more of the following facilities or programs as soon as practicable after consultation with the person, patient or resident, if competent, or his parents, if he is a minor, or his guardian:

(1) A facility licensed by the department of social services under chapter 198, RSMo, and licensed or certified, or both, by the department under this chapter;

(2) A facility or program licensed or certified, or both, by the department;

(3) The home of the client.

2. The department shall provide a written statement to the client, his parent, if the client is a minor, his legal guardian, the referring court or the referring state or private agency or facility, and to the

^{1/}All statutory references are to RSMo Supp. 1982, unless otherwise indicated.

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client's next of kin specifying reasons why a proposed placement is appropriate under section 630.615.

The facilities and programs described in Section 630.620.1(1) and (2) are licensed or certified by the Department of Mental Health ("DMH"). DMH does not license or certify facilities outside the State of Missouri. See, Section 630.735 and the discussion, *supra*. The question assumes that the patient's home is in Missouri. Therefore, Section 630.620 does not authorize out-of-state placements by DMH under these circumstances.

Section 630.630 states:

If a patient or resident, parent, if the patient or resident is a minor, or legal guardian does not consent to transfer of the patient or resident from a facility operated by the department, then the department shall propose other appropriate placement alternatives, if available, and seek to obtain consent under section 630.025 until the alternatives are exhausted. [Emphasis added.]

Section 211.202.5, relating to the placement of mentally disordered children under the jurisdiction of a juvenile court, states:

If at any time the facility determines that it is no longer appropriate to provide inpatient care and treatment for the child committed by the juvenile court, but that such child appears to qualify for placement under section 630.610, RSMo, the head of the facility shall refer such child for placement. Subject to the availability of an appropriate placement, the department of mental health shall place any child who qualifies for placement under section 630.610, RSMo. If no appropriate placement is available, the department of mental health shall discharge the child or make such other arrangements as it may deem appropriate and consistent with the child's welfare and safety. Notice of the placement or discharge shall be sent to the juvenile court which first ordered the child's detention. [Emphasis added.]

Section 211.203.5, relating to the placement of mentally retarded and developmentally disabled children under the jurisdiction of a juvenile court, states:

If at any time the mental retardation facility determines that it is no longer appropriate to provide residential habilitation for the child committed by the juvenile court, but that such child appears to qualify for placement under section 630.610, RSMo, the head of the facility shall refer such child for placement. Subject to the availability of an appropriate placement, the department shall place any child who qualifies for placement under section 630.610, RSMo. If no appropriate placement is available, the department shall discharge the child or make such other arrangements as it may deem appropriate and consistent with the child's welfare and safety. Notice of the placement or discharge shall be sent to the juvenile court which first ordered the child's detention.
[Emphasis added.]

These alternative placement statutes authorize DMH to make "appropriate" placements. In determining whether a placement is appropriate, one must match the services available from the proposed placement facility or program against the needs of the patient. See, Section 630.615 (enumerating placement criteria). It is impossible for DMH to assess the services available from an out-of-state facility or program, because DMH does not license or certify such facilities or programs. No statute exists authorizing DMH officials to travel to, inspect, and approve placement facilities outside the State of Missouri, whether such facilities are located in Kansas or Switzerland. Further, Missouri state officials have no legal authority to enforce standards established for Missouri facilities in other states. Thus, even if Missouri officials traveled to other states to inspect their facilities, they would not have authority to enforce compliance with standards promulgated pursuant to Sections 630.705 and 630.710. Nor would the remedies for noncompliance in Sections 630.740, 630.745, 630.750, and 630.755 be available. Therefore, it follows that Sections 630.630, 211.202.5, and 211.203.5 do not authorize out-of-state placements by DMH.

Section 630.810, Article III(b), which is part of the Interstate Compact on Mental Health, does provide for transfer of patients to institutions in other compact states. However, as was stated in Opinion No. 70-79, Wilson, 1979, such patients become the responsibility of the receiving state. Article III(b) of the Interstate Compact on Mental Health does not provide for out-of-state placement by DMH.

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We find no specific statute granting DMH the authority to place patients outside the State of Missouri. Reinforcing the conclusion that DMH may not make out-of-state placements is the fact that DMH has not pointed to and this office is not aware of an appropriation for this specific purpose. State funds may not be expended except in accordance with an appropriation law and then only if the expenditure is within the purpose of the appropriation. Article III, Section 36 and Article IV, Section 28, Missouri Constitution.

CONCLUSION

It is the opinion of this office that the Department of Mental Health does not have authority to expend state funds for the placement of mentally disordered patients outside the State of Missouri.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 70-79, Wilson, 1979

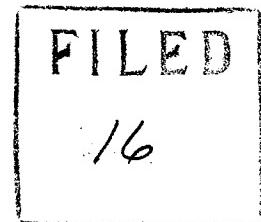
ANNUITIES:
RETIREMENT:
STATE EMPLOYEES RETIREMENT SYSTEM:

Section 104.615, RSMo Supp. 1982, establishes a minimum normal annuity for members of the Missouri State Employees' Retirement System, and any elections made by a member pursuant to Sections 104.395 and 104.400.1, RSMo Supp. 1982, would result in an actuarial reduction to the minimum normal annuity; and the minimum annuity provisions of Section 104.615, RSMo Supp. 1982, shall be applied only to the normal annuity on all retirement benefit payments made by the Board of Trustees of the Missouri State Employees' Retirement System.

September 29, 1983

OPINION NO. 16-83

Ms. Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65102



Dear Ms. Hackwood:

This is in response to your request for an official opinion on the following questions:

(1) Under Section 104.615, RSMo Supp. 1982, as enacted by A.L. 1981 H.B. 835, 53, 591 & 830, I question if the minimum compensation to be received by retired members of the Missouri State Employees' Retirement System is \$112.50 per month, regardless of any reductions in the normal annuity due to retirement prior to the normal retirement age under Section 104.400, RSMo Supp. 1982, or the election by the retiree to receive a reduced benefit in order to provide a continuing survivor's benefit pursuant to Section 104.395, RSMo Supp. 1982.

In summary, is the \$112.50 minimum applicable to the normal retirement benefit (not taking into consideration adjustments for early re-

Ms. Mary-Jean Hackwood

tirement or election of survivor options) or, is \$112.50 the minimum benefit to be paid to a retiree, regardless of age or survivor benefit elected?

(2) If the answer to question 1 is that the minimum annuity to be received by members of the Missouri State Employees' Retirement System under Section 104.615, RSMo Supp. 1982, refers to the normal annuity as computed under 104.374, RSMo Supp. 1982, and that the minimum annuity is then reduced under Sections 104.395 and 104.400, then does the Missouri State Employees' Retirement System have the authority to continue making retirement benefit payments to retirees in excess of the proper amount as has been done since 1980 due to an administrative interpretation made at that time?

Section 104.615, RSMo Supp. 1982,^{1/} provides in pertinent part:

The provisions of section 104.374 to the contrary notwithstanding, any member of the state employees' retirement system, other than members and former members of the general assembly, and any member of the highway employees' and highway patrol retirement system, if such member of either system has fifteen years or more of creditable service; including compensation received for service as a special consultant, shall not be less than one hundred twelve dollars and fifty cents per month, reduced by one-fifteenth for each year of creditable service for those retirees with ten years or more and less than fifteen years of creditable service. . . .

A notation by the Revisor of Statutes included in the 1982 Cumulative Supplement to the Revised Statutes of Missouri states that the words "the total annuity of" were apparently omitted through clerical error in enacting House Bill 835 in 1981. These words are necessary to the first sentence of Section 104.615 for it to be a logical sentence. Otherwise, the sentence would read, "[A]ny member of the state employees' retirement system . . .

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All statutory references are to RSMo Supp. 1982, unless otherwise indicated.

shall not be less than one hundred twelve dollars and fifty cents per month . . ." In construing a statute, we must presume that the legislature intended a logical and reasonable result, not an absurd or unreasonable result. *Breeze v. Goldberg*, 595 S.W.2d 381, 382 (Mo. App. 1980). Section 104.615 will be read to include the words "the total annuity of" for purposes of answering the questions presented.

Section 104.374 referred to in Section 104.615 provides the formula for computing the normal annuity of most members of the retirement system. It reads:

The normal annuity of a member, other than a member of the general assembly or a member who served in an elective state office, shall be an amount equal to one and one-fourth percent of the average compensation of the member multiplied by the number of years of creditable service of the member.

A member of the retirement system may retire with something other than the normal annuity under Sections 104.395 and 104.400.1. Section 104.395 provides in pertinent part:

In lieu of the normal annuity otherwise payable to a member under section 104.374 or 104.400, a member whose age at retirement is fifty-five years or more may elect in the member's application for retirement to receive either:

Option 1. The actuarial equivalent of the member's normal annuity in reduced monthly payments for life during retirement with the provision that upon the member's death the reduced normal annuity shall be continued throughout the life of and paid to the member's spouse; or

Option 2. Some other option approved by the board which shall be the actuarial equivalent of the annuity to which the member is entitled under this system. . . .

This statute allows a member to elect an option whereby the member's surviving spouse or some other person receives benefits beyond the life of the member, and the member receives a reduced annuity that is the actuarial equivalent of the member's normal annuity.

Ms. Mary-Jean Hackwood

Section 104.400.1 provides:

Any member after attaining fifty-five years of age and having had at least fifteen years of vesting service or at least three biennial assemblies as a member of the general assembly may retire. In such case, the member shall receive an annuity in an amount which is the actuarial equivalent of the normal annuity the member would have received commencing at the earliest date on which the member is entitled to an unreduced benefit based on the member's creditable service at the date of the member's termination of employment.

This section provides that a member who is 55 years of age and has at least 15 years of vesting service or three biennial assemblies as a member of the general assembly may receive retirement benefits that are the actuarial equivalent of the member's normal annuity. The earliest date at which a member who has 15 years of creditable service or who has served in three biennial assemblies as a member of the general assembly is entitled to an unreduced benefit is when that member reaches age 60, under Section 104.400.2. If a member retires under the provisions of Section 104.400.1, he is retiring at an age of anywhere from 55 through 59 years. The actuarial equivalent of that member's normal annuity that he or she would receive at age 60 is a lesser amount than the normal annuity.

Your first question arises from an ambiguity in the language of the first sentence of Section 104.615, which may be read, "[T]he total annuity of any member of the state employees' retirement system . . . shall not be less than . . ." If only this portion of Section 104.615 is read, one might conclude that a member is to receive a specific minimum annuity, regardless of whether the member elects an option under Section 104.395 that would allow the payment of benefits to a survivor, or whether the member chooses to retire prior to age 60 under the terms of Section 104.400.1, both constituting choices that would require an actuarial reduction to the normal annuity under the provisions of the law. However, such a reading ignores the first clause of the sentence, a clause that modifies the construction of the statute.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, and to give effect to that intent if possible. *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 445 (Mo. banc 1980). In determining the meaning of a statute, consideration may be given to the entire purpose and policy of the statute and the language and the totality of the enactment. *State ex rel. Henderson v.*

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Proctor, 361 S.W.2d 802, 805 (Mo. banc 1962). If possible, significance and effect should be given to every word, phrase, sentence and part thereof, if it is in keeping with the legislative intent. **State ex rel. Jones v. Ralston Purina Co.**, 358 S.W.2d 772, 777 (Mo. banc 1962). The reference in Section 104.615 to the contrary terms of Section 104.374 prior to specifying minimum annuity amounts indicates that the legislature intended to supersede the provisions of Section 104.374 establishing the normal annuity for members of the Missouri State Employees' Retirement System. However, there are no references to Sections 104.395 and 104.400.1 in Section 104.615 that would indicate an intent by the legislature to supersede the provisions of those sections requiring an actuarial reduction. The reference to Section 104.374 alone in Section 104.615 indicates that the minimum annuity established in that section is a minimum normal annuity and that any elections made under Sections 104.395 and 104.400.1 would result in an actuarial reduction to the minimum normal annuity received under Section 104.615.

You have stated that Section 104.615 was interpreted by a previous executive secretary of the retirement system to establish a minimum annuity regardless of any sections under Sections 104.395 and 104.400.1 and has been administered accordingly since 1980, leading to your second question, which inquires whether the retirement system has the authority to continue making retirement benefit payments in this manner.

The funds of the retirement system are trust funds. See Section 104.440.1, RSMo Supp. 1982. Trustees are fiduciaries of the highest order, and are required to observe meticulously the fiduciary relationship, to exercise the utmost good faith in handling the trust funds, and to exercise high standards of conduct and fidelity in respect to administration of the trust. **Morrison v. Asher**, 361 S.W.2d 844, 850 (Mo. App. 1962). Trustees must strictly comply with the law in all respects regarding trust funds. **White v. Hughes**, 88 S.W.2d 268, 272 (Mo. App. 1935). The Board of Trustees, vested with the duty to make certain benefit payments, may make those benefit payments only in accordance with the provisions of the statutes. See 70 C.J.S. Pensions Section 10 (1951). Therefore, the minimum annuity provisions of Section 104.615 shall be applied only to the normal annuity on all future retirement benefit payments and the Board may not continue to pay what has been determined to be an incorrect amount.

Ms. Mary-Jean Hackwood

CONCLUSION

It is the opinion of this office that:

(1) Section 104.615, RSMo Supp. 1982, establishes a minimum normal annuity for members of the Missouri State Employees' Retirement System, and any elections made by a member pursuant to Sections 104.395 and 104.400.1, RSMo Supp. 1982, would result in an actuarial reduction to the minimum normal annuity.

(2) The minimum annuity provisions of Section 104.615, RSMo Supp. 1982, shall be applied only to the normal annuity on all retirement benefit payments made by the Board of Trustees of the Missouri State Employees' Retirement System.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Patricia D. Perkins.

Very truly yours,


JOHN ASHCROFT
Attorney General

STATE EMPLOYEES' RETIREMENT SYSTEM: A member of the Missouri State Employees' Retirement System who works continuously until he or she is eligible to retire pursuant to Chapter 104, RSMo Supp. 1982, is entitled to credit for unused sick leave even though the member chooses to defer the payment of retirement benefits.

May 25, 1983

OPINION NO. 20-83

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101



Dear Ms. Hackwood:

You have requested our legal opinion on the following question:

Can a member of this Retirement System, who works until a retirement age and who completes all the service requirements in order to be eligible for a continuing benefit from the plan (i.e. age 55 with 15 years of service), but who defers a payment of retirement benefit until a later date, receive credit for his unused sick leave in accordance with Section 104.601, RSMo?

Section 104.601, RSMo 1982, states in pertinent part as follows:

Any member retiring under the provisions of chapter 104 or any member retiring under provisions of chapter 169, RSMo, who is a member of the public school retirement system and who is employed by a state agency other than an institution of higher learning, after working continuously until reaching retirement age, shall be credited with all his unused sick leave as certified by his employing agency. . . .

Mary-Jean Hackwood

Clearly, the provisions of Section 104.601 apply only to individuals who retire. Under Section 104.380, RSMo Supp. 1982, any member of the Missouri State Employees' Retirement System may retire at the end of the month during which the member reaches normal retirement age, as normal retirement age is defined in Section 104.310(23), RSMo Supp. 1982. Any member may also retire after attaining fifty-five years of age and having had at least fifteen years of vesting service. Section 104.400.1, RSMo Supp. 1982. Your question requires us to assume that the individual has satisfied the requirements for retirement. Therefore, we must determine whether an individual who satisfies the requirements for retirement but who defers retirement benefits until a later date may receive credit for his unused sick leave.

At the outset we note that Section 104.335, RSMo Supp. 1982, authorizes vested system members to defer the payment of retirement annuities. Thus, we find a clear statutory basis for the deferral of payment of retirement benefits to which your question refers.

Section 104.601 requires that a member work "continuously until reaching retirement age, . . ." Chapter 104 does not define the phrase "retirement age." The phrase "normal retirement age" is defined in Section 104.010(23) as follows:

[T]he later to occur of the attainment of sixty years of age for patrolmen and sixty-five years of age for all other members, or the completion of four years of creditable service;

Since the phrase "retirement age" is used instead of "normal retirement age" in Section 104.601, we may infer that the legislature intended a different meaning for "retirement age" than it established for "normal retirement age."

As set forth above, the statutes specify ages at which a member may retire, dependent upon the member's years of creditable service. Therefore, we believe the "retirement age" for any given member would be the age at which the member may retire and begin receiving benefit payments immediately.

Under our interpretation of the phrase "retirement age," an individual who attains age fifty-five having worked continuously for fifteen years will have worked continuously until "retirement age" for purposes of Section 104.601, regardless of when the individual chooses to begin receiving retirement benefits.

Mary-Jean Hackwood

CONCLUSION

It is the opinion of this office that a member of the Missouri State Employees' Retirement System who works continuously until he or she is eligible to retire pursuant to Chapter 104, RSMo Supp. 1982, is entitled to credit for unused sick leave even though the member chooses to defer the payment of retirement benefits.

The foregoing opinion, which I hereby approve, was prepared by my assistant Sara Rittman.

Very truly yours,



JOHN ASHCROFT
Attorney General

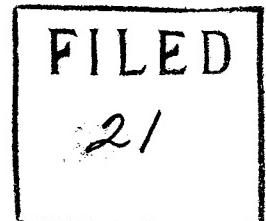
STATE EMPLOYEES' RETIREMENT SYSTEM:

The creditable prior-service entitlement created by Section 104.345.6, RSMo Supp. 1981 (repealed), applies only to those members of the Missouri State Employees' Retirement System whose employment terminates on or after the effective date of Section 104.345.6, RSMo Supp. 1981 (repealed).

September 2, 1983

OPINION NO. 21-83

Ms. Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65101



Dear Ms. Hackwood:

You have requested our legal opinion on the following questions:

What is the effective date of Section 104.345(6), RSMo, if a retired employee is entitled to receive a benefit increase as a result of additional service credit?

The effective date of the statute containing this provision (HB 835, 53, 591 & 830 of the 81st General Assembly) was May 12, 1981. Are benefit increases to be paid only subsequent to this date? Are benefit payments to be pro-rated for a partial month?

Section 104.345.6, as enacted by H.C.S.H.B. 835, 53, 591 and 830, 1981 Mo. Laws 273, 283, and as it appeared in RSMo Supp. 1981,^{1/} states:

1/

Section A of H.C.S.H.B. 835, 53, 591 and 830, 1981 Mo. Laws at 299, purports to make this statute effective upon its passage and approval. This bill was approved by the Governor on May 12, 1981. It is the policy of this office to defend the constitutionality of statutes, including the constitutionality of emergency clauses. Accordingly, we do not measure this emergency clause against the requirements of Article III, Sections 29 and 52(a), Missouri Constitution.

Ms. Mary-Jean Hackwood

Any member of the system who served as an employee prior to September 1, 1957, but was not an employee on that date, shall be entitled to the creditable prior service that such employee would have been entitled to had such employee become a member of the retirement system on the date of its inception, if such employee has or attains ten or more years of continuous membership service. [Emphasis added.]

Prior to the enactment of Section 104.345.6, RSMo Supp. 1981, no such entitlement to creditable prior service existed.

Section 104.345, RSMo Supp. 1981, was repealed by H.C.S.H.B. 1720, 1645, and 1276, 1982 Mo. Laws 271. Section 104.345.8, RSMo Supp. 1982,^{2/} states:

Any member of the system whose employment terminates on or after May 12, 1981, and who served as an employee prior to September 1, 1957, but was not an employee on that date, shall be entitled to the creditable prior service that such employee would have been entitled to had such employee become a member of the retirement system on the date of its inception, if such employee has or attains ten or more years of continuous membership service. [Emphasis added.]

Section 104.310, RSMo Supp. 1982, states:

Whenever in sections 104.310 to 104.615, or in any proceeding under sections 104.310 to 104.615, the following words or terms are used, unless the context clearly indicates that a different meaning is intended, they shall have the following meanings:

2/

Section A of H.C.S.H.B. 1720, 1645 and 1276, 1982 Mo. Laws at 283, purports to make this bill effective upon its passage and approval. This bill was approved by the Governor on May 25, 1982.

. . . ;

(20) "Employee":

(a) Any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is currently accumulating benefits under some other retirement or benefit fund to which the state is a contributor; except persons who are members of the public school retirement system and who are employed by a state agency other than an institution of higher learning shall be deemed "employees" for purposes of participating in all insurance programs administered by the state retirement board under sections 104.310 to 104.615; and, except this definition shall not exclude any employee as defined herein who is covered only under the Federal Old Age and Survivors' Insurance Act, as amended. As used in sections 104.310 to 104.615, the term "employee" shall include civilian employees of the Army National Guard or Air National Guard of this state who are employed pursuant to Section 709 of Title 32 of the United States Code and paid from federal appropriated funds;

(b) Any person who has performed services in the employ of the general assembly or either house thereof, or any employee of any member of the general assembly while acting in his official capacity as a member, and whose position does not normally require him to perform duties during at least one thousand five hundred hours per year, providing such service, together with any full-time service in any department which may have been earned, shall total at least eighty-four months of service; with a month of service being any monthly pay period in which the employee was paid for full-time employment for that monthly period;

. . . ;

(25) "Member", a member of the Missouri state employees' retirement system, without regard to whether or not the member has been retired; [Emphasis added in part.]

We find that Section 104.345.6, RSMo Supp. 1981 (repealed), does not create an entitlement to creditable prior service for members of the Missouri State Employees' Retirement System (hereinafter sometimes referred to as "MOSERS") who were retired on the effective date of Section 104.345.6, RSMo Supp. 1981 (repealed).

Article I, Section 13, Missouri Constitution, states:

In order to assert our rights, acknowledge our duties, and proclaim the principles on which our government is founded, we declare:

. . . .

That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted. [Emphasis added.]

In *State ex rel. Breshears v. Missouri State Employees' Retirement System*, 362 S.W.2d 571 (Mo. banc 1962), the Supreme Court of Missouri held an increase in the normal annuity of members of MOSERS to be retrospective, as applied to members who had retired prior to the effective date of the increase, and thus such increase was a violation of Article I, Section 13, Missouri Constitution. The court also indicated that to the extent the MOSERS Benefit Fund was depleted to pay retired members increased benefits for past services rendered, such gratuitous depletion of the fund would impair the State's contracts with active members who were to be paid benefits from the fund in the future.

Article III, Section 38(a), Missouri Constitution, states:

The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or

rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during their service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States. [Emphasis added.]

Article III, Section 39(3), Missouri Constitution, states:

The general assembly shall not have power:

. . . ;

(3) To grant or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor after service has been rendered or a contract has been entered into and performed in whole or in part; [Emphasis added.]

In *State ex rel. Cleaveland v. Bond*, 518 S.W.2d 649 (Mo. 1975), the Supreme Court of Missouri held a retirement benefit act purporting to confer benefits on judges who had retired prior to the effective date of the act to be a grant of public money to former state officers that violated Article III, Sections 38(a) and 39(3), Missouri Constitution. The court stated:

"[T]o be valid under constitutional requirements, the pensions must be conferred upon persons who at the time of receiving the right to them are officers or employees of the municipality. They cannot be conferred upon persons who had, previously to the grant, retired from the service of the city. . . ." [Id., at 652, quoting, Dillon on Municipal Corporations, 5th Ed., § 430 (emphasis in original).]

The usual method the General Assembly uses to avoid these constitutional provisions is the "consultant contract". The consultant contract device was approved by the Supreme Court of Missouri in *State ex rel. Dreer v. Public School Retirement System of the City of St. Louis*, 519 S.W.2d 290 (Mo. 1975).

Section 104.610.1, RSMo Supp. 1982, states in part:

Any person, who is receiving or hereafter may receive state retirement benefits from the Missouri state employees' retirement system, upon application to the board of trustees of the system from which he or she is receiving retirement benefits, shall be made, constituted, appointed and employed by the board as a special consultant on the problems of retirement, aging, and other state matters, for the remainder of the person's life,

Compensation for employment as a special consultant is specified in Section 104.610, RSMo Supp. 1982, as well as in Sections 104.612 and 104.515.12, RSMo Supp. 1982. Nowhere is the entitlement to creditable prior service created in Section 104.345.6, RSMo Supp. 1981 (repealed), designated as compensation for or limited to special consultants. Therefore, the special consultant device may not be used at this time to "grant" creditable prior service entitlements to those members of MOSERS who retired prior to the effective date of Section 104.345.6, RSMo Supp. 1981 (repealed).

The foregoing raises serious doubts regarding the constitutionality of applying the definition of the word "member" in Section 104.310(25), RSMo Supp. 1982, to the creditable prior-service entitlement in Section 104.345.6, RSMo Supp. 1981 (repealed). If possible, statutes should be construed in harmony with the Constitution.

The General Assembly has directed that the definition of the word "member" in Section 104.310(25), RSMo Supp. 1982, is to be used "unless the context clearly indicates a different meaning is intended". Section 104.310, RSMo Supp. 1982. The historical context of this creditable prior-service entitlement shows that in the next legislative session after its enactment the General Assembly clarified the scope of Section 104.345.6, RSMo Supp. 1981 (repealed), by enacting Section 104.345.8, RSMo Supp. 1982, which provides a creditable prior-service entitlement only to those members of MOSERS "whose employment terminates on or after May 12, 1981," Cf. State ex rel. Breshears v. Missouri State Employees Retirement System, 362 S.W.2d 571, 574 (Mo. banc 1962) (applying the definition of the word "member" to a retrospective benefit increase where there was no such later, clarifying statutory amendment).

Construing Section 104.345.6, RSMo Supp. 1981 (repealed), (1) in harmony with Article I, Section 13, and Article III, Sections 38(a) and 39(3), Missouri Constitution, and (2) consistent with the later, clarifying amendment to this statute codified at

Ms. Mary-Jean Hackwood

Section 104.345.8, RSMo Supp. 1982, we conclude that the word "member" in Section 104.345.6, RSMo Supp. 1981 (repealed), should be read only as applying to those members of MOSERS whose employment terminates on or after the effective date of Section 104.345.6, RSMo Supp. 1981 (repealed).

Having reached this conclusion regarding your first question, the second question presented is moot.

CONCLUSION

It is the opinion of this office that the creditable prior service entitlement created by Section 104.345.6, RSMo Supp. 1981 (repealed), applies only to those members of the Missouri State Employees' Retirement System whose employment terminates on or after the effective date of Section 104.345.6, RSMo Supp. 1981 (repealed).

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

March 28, 1983

OPINION LETTER NO. 22-83

Mary-Jean Hackwood
Executive Secretary
Missouri State Employees'
Retirement System
900 Leslie Boulevard
Jefferson City, Missouri 65102

FILED

22

Dear Ms. Hackwood:

This letter is in response to your request for an opinion as follows:

Are the employees of the Missouri Housing Development Commission, if they are not on State payroll, eligible to participate in the State Group Medical Care Plan and the Missouri State Employees' Retirement System?

Under your question, persons employed to work for the Missouri Housing Development Commission (hereinafter MHDC) will not be paid by the State of Missouri. Because we do not believe Chapter 215, RSMo, or Appendix B(1), RSMo 1978, permit MHDC to remove employees assigned to it from the state payroll, we do not believe we need render an opinion on the entirety of your question.

Appendix B(1), Section 6, provides as follows:

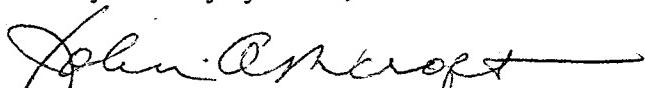
All staff for the Environmental Improvement Authority and the Missouri Housing Development Commission shall be provided by the [director of CARL]. . . . All other employees assigned to work for the . . . Missouri Housing Development Commission except the directors of staff, their personal secretaries, and two deputies shall be appointed by the director of [CARL] . . . in accord with chapter 36, RSMo 1969, and shall be assigned and may be reas-

Mary-Jean Hackwood

signed as required by the [director of CARL]
. . . in such manner as to provide optimum
service, efficiency, and economy. Each body
shall be charged for state costs relating to
administration, under contract negotiated by
each department and the body assigned to the
department and approved by the commissioner of
administration. All charges shall be payable
to the state's general revenue fund. [Emphasis
added].

By requiring that MHDC staff be "provided" by the director of the Department of Consumer Affairs, Regulation and Licensing (hereinafter CARL), that such staff be selected according to the Merit System Law and assigned and reassigned as required by the director and that MHDC and CARL enter an agreement under which MHDC would be charged for state costs relating to administration, we believe the General Assembly intended that MHDC staff remain employees of CARL and remain on the state payroll. We believe an interpretation of Appendix B(1) which permits MHDC staff to be taken from the state payroll limits the ability of the director to exercise authority over such staff as mandated by law and frustrates the desires of the legislature.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

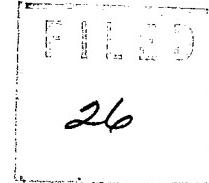
(314) 751-3321

December 29, 1983

DIRECT DIAL:

OPINION LETTER NO. 26-83

The Honorable Dennis Smith
Senator, District 30
State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Smith:

Prior to leaving office, your predecessor, Paul L. Bradshaw, requested an opinion on the questions below. This is our response.

Specifically, the two questions ask:

1. Can a municipally-owned utility charge higher rates to customers residing outside the city's corporate limits than it does to customers residing inside its corporate limits if the cost of servicing all customers is the same?
2. If the answer to #1 is No, can the municipally-owned utility charge a higher rate to customers residing outside the corporate limits if the cost of servicing those customers is greater? If so, must the higher rate be limited so as to only cover the additional expenses?

The opinion request sets forth the facts giving rise to these questions as follows:

The City of Springfield purchased a private water company which serviced Springfield residents and customers living outside the corporate city limits. Thereafter the city acquired the right to supply gas from the existing supplier. Thereafter the city acquired the right to provide electricity and bus service; and now provides water, gas, electric, and bus service. The city operates these services by and through the Board of Public Utilities under the name of City Utilities of Springfield, Missouri.

The Honorable Dennis Smith

The city now does not provide any bus service, street lights, or fire hydrants to customers living outside the city limits. The city receives free electric, gas, and water service on all municipal buildings. The city does not provide sewer service to residents outside the city, but does not charge for the sewer service.

Contractors developing land in the county are required to pay City Utilities the same cost for installing services as is charged contractors developing land within the city. [Emphasis in original.]

No information supplied to us shows the specific authority for the City of Springfield to supply utility services to nonresidents of the city. Accordingly, we cannot examine any limitations on the city's rate-making authority inherent in the authorization to provide utility services to nonresidents of the city, if such exist.¹ In particular, no documentation has been presented showing that the city operates as a public utility with respect to its nonresidential customers.

¹The City of Springfield is a constitutional charter city, the general powers of which are governed by Missouri Constitution, Article VI, Section 19(a). See also Sections 91.010-91.040 and 91.600, RSMo 1978. Cf. Missouri Public Service Co. v. City of Trenton, 509 S.W.2d 770 (Mo. App. 1974); Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841 (1934) (which conclude that statutory class cities may not maintain certain utility "transmission facilities" outside their territorial boundaries). As stated, we have not examined the ordinances or charter of the City of Springfield to determine if there are limitations on the city's rate-making authority contained in these documents.

²In a letter dated February 2, 1983, F. Bennett Lilley, a Springfield, Missouri, attorney, submitted a letter to this office in which he stated that "because the County residents have no choice in their utility company, City Utilities is acting as a public utility in servicing those county residents." We believe that a court of law will require more of a factual showing than this bare assertion to show that the city acts as a utility with regard to its non-residential customers, especially in light of the general rule that a city may discriminate in its utility rate structures between city residents and non-city residents, when there is some factual reason for that differentiation. See Annot., 4 A.L.R.2d, 595-612 (1949).

The Honorable Dennis Smith

In Forest City v. City of Oregon, 569 S.W.2d 330 (Mo.App. 1978), the court refused to exercise its equitable jurisdiction to review the reasonableness of a nonresidential city water rate that was higher than the residential city water rate. The court noted that it had jurisdiction to regulate municipal utility rates when charges "are clearly, palpably and grossly unreasonable." 569 S.W.2d at 333. However, the court found that this jurisdiction "applies only when the city is acting in the nature of a public utility. A considerable line of cases hold that a city does so only to the extent that it supplies the utility service to its own inhabitants, and that as to nonresidents, the municipality owes no duty of service, sells in purely private capacity on a purely contractual basis, and cannot be regulated as to the rates charged." 569 S.W.2d at 334. The court went further by stating that even if the nonresidential rates could be regulated by the court, "a rate does not become unreasonable or discriminatory simply because a municipality charges more to nonresidents than it does to its own inhabitants." 569 S.W.2d at 334.

Therefore, we believe that unless the nonresidential customers of a municipal utility show (1) that the city acts as a public utility with regard to such nonresidential customers and (2) that the higher nonresidential city utility rates are not based on any reasonable distinction between residential and nonresidential customers, a court will not exercise its equitable jurisdiction to declare such higher nonresidential rates clearly, palpably and grossly unreasonable.

Very truly yours,


JOHN ASHCROFT
Attorney General

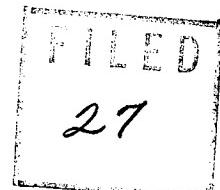
FARMERS HOME ADMINISTRATION:
INTERGOVERNMENTAL TAX IMMUNITY:
TAXATION - EXEMPTIONS:
PROPERTY TAX:
PROPERTY TAX EXEMPTION:

The phrase "[n]o tax shall be imposed on lands the property of the United States; . . ." in Article III, Section 43, Missouri Constitution (1945), is merely a declaration of the intergovernmental tax immunity doctrine and does not create a tax exemption for purposes of 7 C.F.R. Section 1955.63(f)(1)(1983). When Congress has waived its tax immunity and consented to the taxation of its lands--as it has done with regard to land owned by the Farmers Home Administration in 42 U.S.C. Section 1490h (Supp. IV 1980)--Article III, Section 43, Missouri Constitution (1945), does not preclude state or local taxation of these federal lands.

October 6, 1983

OPINION NO. 27-83

Samuel C. Jones, Chairman
Missouri State Tax Commission
623 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Mr. Jones:

This opinion is rendered in response to your question asking:

Does Article III, §43 [sic] of the Missouri Constitution of 1945 preclude ad valorem taxation of real property located in Missouri and repossessed by Farmers Home Administration?

Article III, Section 43, Missouri Constitution (1945), states in relevant part "[n]o tax shall be imposed on lands the property of the United States; . . ."

42 U.S.C. Section 1490h (Supp. IV 1980) states in part:

All property subject to a lien held by the United States or the title to which is acquired or held by the Secretary under this subchapter other than property used for administrative purposes shall be subject to taxa-

Samuel C. Jones, Chairman

tion by a State, Commonwealth, territory, possession, district, and local political subdivisions in the same manner and to the same extent as other property is taxed: [Emphasis added.]

7 C.F.R. Section 1955.63(f)(1)(1983) states in part:

Property acquired by FmHA is subject to taxation by State, Commonwealth, territory, district, and local political subdivisions in the same manner and to the same extent as other property, unless State law specifically exempts taxation of real estate owned by the Federal Government. . . . [Emphasis added.]^{1/}

The issue is whether that portion of Article III, Section 43, Missouri Constitution (1945), quoted above specifically exempts the ad valorem taxation of real property located in Missouri and repossessed by the Farmers Home Administration. For the reasons stated below, this office concludes that Article III, Section 43, Missouri Constitution (1945), does not create such an exemption.

The language of Article III, Section 43, Missouri Constitution (1945), stating "[n]o tax shall be imposed on lands the property of the United States; . . ." has a long and venerable history. In Section 4 of the Act of March 6, 1820, ch. 22, 3 Stat. 545 (the enabling act authorizing the People of the Missouri Territory to form a constitution and state government), the Congress stated the condition "that no tax shall be imposed on lands the property of the United States; . . ." Accordingly, Article X, Section 1, Missouri Constitution (1820), stated in part "[n]o tax shall be imposed on lands the property of the United States, . . ." Article XI, Section 1, Missouri Constitution (1865), stated in part "[n]o tax shall be imposed on lands the property of the United States; . . ." Article XIV, Section 1, Missouri Constitution (1875), stated in part "[n]o tax shall be imposed on lands the property of the United States; . . ."

1/

We interpret the federal statute quoted above as making Farmers Home Administration property taxable in the same manner and to the same extent as other property is taxed under state law. We find it difficult to see how a federal agency can interpret Missouri law through the promulgation of a federal rule. So far, the validity of this federal rule has not been challenged. See *Dawson v. Childs*, 665 F.2d 705, 711 (5th Cir. 1982).

Samuel C. Jones, Chairman

In **McCulloch v. Maryland**, 17 U.S. 316, 425-437 (1819), Chief Justice Marshall interpreted the supremacy clause of the federal constitution, U.S. Const. art. VI, cl. 2, as granting the operations of instruments employed by the United States an immunity from state taxation. The scope of the **McCulloch** immunity was unclear. The Court stated: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, . . ." 17 U.S. at 436.

In **Van Brocklin v. Tennessee**, 117 U.S. 151 (1886), the Court held that land the United States acquired through the enforcement of tax liens shared in the intergovernmental tax immunity.

In the course of the **Van Brocklin** opinion, the Court stated at 117 U.S. at 163-164:

Upon the admission of every other State into the Union, the exemption of the lands of the United States from taxation by the State has been declared--sometimes in the form of a condition imposed by Congress, and sometimes in the form of proviso to a provision to grant the State certain lands or money, offered for its acceptance or rejection--in phrases somewhat varying, but substantially similar to one another.

In the acts for the admission of Mississippi in 1817, Alabama in 1819, Missouri in 1820, Arkansas in 1836, Michigan in 1837, Iowa in 1845 and 1846, Wisconsin in 1847, Minnesota in 1857, and Oregon in 1859, the words are "no tax shall be imposed on lands the property of the United States," or words of exactly the same meaning. . . . [citations omitted]. In the acts of 1864 for the admission of Nevada, of 1864 and 1867 for the admission of Nebraska, and of 1875 for the admission of Colorado, the expression is somewhat fuller, "no tax shall be imposed by the State on lands or property therein, belonging to, or which may hereafter be purchased by, the United States." . . . [citations omitted]. [Emphasis added.]

Samuel C. Jones, Chairman

At 117 U.S. at 167, the Court stated:

It cannot be doubted that the provisions which speak of the exemption of property of the United States from taxation, in the various acts of Congress admitting States into the Union, are equivalent to each other; and that, like the other provision, which often accompanies them, that the State "shall not interfere with the primary disposal of the soil by the United States," they are but declaratory, and confer no new right or power upon the United States. [Emphasis added.]

Again, at 117 U.S. at 171, the Court stated:

The legislatures of most of the States have affirmed the same principle, by inserting in their general tax acts an exemption of property belonging to the United States. Such a provision, as has been well observed by the Supreme Court of Connecticut in *West Hartford v. Water Commissioners*, above cited, is not the foundation of the exemption, but is inserted only from abundant caution, and because the assessment of taxes is to be made by local officers skilled in the valuation of property, but presumably unlearned in legal distinctions. 44 Conn. 368. [Emphasis added in part.]

In *Boeing Aircraft Co. v. Reconstruction Finance Corporation*, 25 Wash. 2d 652, 171 P.2d 838 (1946), appeal dismissed and cert. denied, 330 U.S. 803 (1947), Boeing Aircraft Company entered into a sale and leaseback agreement on certain land with the Reconstruction Finance Corporation, a corporation owned by the United States. A federal statute made land owned by this corporation taxable by states, counties, municipalities, and other local taxing authorities to the same extent as other real property. The enabling act authorizing the organization of the State of Washington and the Washington Constitution contained words similar to those quoted above in regard to Missouri law.

The Boeing court reviewed the Van Brocklin case and concluded as follows at 171 P.2d at 845:

We hold that our constitutional provisions relative to taxes upon Federal property are not compelling, in that they do not bind this state to exempt from taxation property

Samuel C. Jones, Chairman

owned by the United States, and that in all cases Federal property shall be taxed by this state **when consent is given by the Congress of the United States.** [Emphasis added.]

In **State ex rel. Reconstruction Finance Corporation v. Sanlader**, 250 Wis. 481, 27 N.W.2d 447 (1947), the Kearney-Trecker Corporation entered into a sale and leaseback agreement on certain land with the Defense Plant Corporation, which was later merged into the Reconstruction Finance Corporation. Again, there was a federal statute consenting to state and local taxation of land held by the Reconstruction Finance Corporation. Again, there were provisions in the enabling act authorizing the organization of the State of Wisconsin and in the Wisconsin Constitution stating that no tax shall be imposed on land which is the property of the United States or words of similar effect.

The court in **Sanlader**, 27 N.W.2d at 450-451, stated:

McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579 is generally considered to hold that lands and property of the United States are exempt from taxation by the state in which they are located although a reading of the opinion would seem to raise some question whether it is not limited to a holding that means and instrumentalities employed by the federal government for the execution of its powers are not taxable. In any event, it is said in the opinion that the lands of the Bank of the United States located in Maryland were taxable although the operations of the bank were not. However, the matter was put in issue by the briefs of counsel and the general opinion of the bar and legal writers was that the opinion had the broader scope above indicated. In **Van Brocklin v. State of Tennessee**, 117 U.S. 151, 6 S.Ct. 670, 29 L.Ed. 845 it was held explicitly that the states had no power to tax federally owned lands. In the opinion in this case it was also stated that enabling acts under which such states as Wisconsin were admitted to the union are equivalent to each other, are wholly declaratory in character and confer no new right or power upon the United States. It is suggested in 1 Willoughby 154 that the enabling acts were the result of misgivings concerning the scope of the holding in **McCulloch v. Maryland**, supra. We deem this of little consequence.

Samuel C. Jones, Chairman

In any case the legal effect of an enabling act and its acceptance by any state admitted under it is simply to declare the law as it existed from the time the federal constitution was adopted. Without it, a state could not tax lands of the United States located within its boundaries except with [sic] the consent of the United States.

Another principle well established is that set forth in *Coyle v. Smith*, 221 U.S. 559, 31 S.Ct. 688, 55 L.Ed. 853. It was there held that when a new state is admitted to the union it is so admitted with all the powers of sovereignty and jurisdiction which pertain to the original states and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the union which would not be valid and effectual if the subject of congressional legislation after admission. Hence, congress could not exact as a condition to statehood that Wisconsin engage not to tax federal lands by a constitutional provision if it meant thereby to require that Wisconsin could not act upon the consent of Congress to tax federal lands unless it adopted a constitutional amendment by the procedure requisite to such amendments. To exact this would impede and delay Wisconsin in responding to a consent to tax in a manner that the original 13 states and such states as were not admitted by such enabling acts are not impeded and would be of no force and effect under the doctrine of *Coyle v. Smith*, supra. Hence, it must be assumed unless the language of the enabling act clearly repels the assumption, that Congress did not mean so to limit and prescribe the sovereignty of the state of Wisconsin. The inference is a genuine one since the applicable provisions of the enabling act were inserted out of an abundance of caution and it cannot be supposed that the design was to do more than to make it clear that lands of the United States were not without its consent to be taxed by the state.

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The court concluded at 27 N.W.2d at 451-452:

The foregoing leads us to the conclusions (1) that the enabling acts are merely declaratory of a rule that a state may not without federal consent tax lands owned by the United States; (2) that these acts were founded in caution and meant to do no more than secure by compact what the law required in any event; (3) that the state of Wisconsin had no motive for going any further with its constitutional provisions than was necessary to meet the conditions imposed by Congress; (4) that the rule contended for by respondent would make it impossible for the state of Wisconsin even by constitutional amendment to tax lands of the United States or its instrumentalities.

In *Board of County Com'rs of Sedgwick County, Kan. v. United States*, 105 F. Supp. 995 (Ct. Cl. 1952), the Defense Plant Corporation, which was later merged into the Reconstruction Finance Corporation, a corporation owned by the United States, acquired a plant for the manufacture of B-29 bomber airplanes and leased this property to Boeing Aircraft Company. After World War II, this property was declared surplus and such was transferred to the War Assets Administration. Again, there was a federal statute consenting to state taxation of land held by the Reconstruction Finance Corporation. The State of Kansas had a statute exempting all property belonging exclusively to the United States from property taxation. Again relying on the *Van Brocklin* case, the court concluded that the Kansas statute "was merely declaratory of a constitutional immunity, and was not itself the source of the exemption, its operative effect was necessarily coterminous with that immunity." 105 F. Supp. at 999. The court concluded that Kansas could tax this property during the years it was held by the Reconstruction Finance Corporation.

Article X, Section 6.1, Missouri Constitution (1982), states:

All property, real and personal, of the state, counties and other political subdivisions, and nonprofit cemeteries, shall be exempt from taxation; all personal property held as industrial inventories, including raw materials, work in progress and finished work on hand, by manufacturers and refiners, and all personal property held as goods, wares, merchandise, stock in trade or inventory for resale by distributors, wholesalers, or retail merchants or establishments shall be exempt

Samuel C. Jones, Chairman

from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. In addition to the above, household goods, furniture, wearing apparel and articles of personal use and adornment owned and used by a person in his home or dwelling place may be exempt from taxation by general law but any such law may provide for approximate restitution to the respective political subdivisions of revenues lost by reason of the exemption. All laws exempting from taxation property other than the property enumerated in this article, shall be void. The provisions of this section exempting certain personal property of manufacturers, refiners, distributors, wholesalers, and retail merchants and establishments from taxation shall become effective, unless otherwise provided by law, in each county on January 1 of the year in which that county completes its first general reassessment as defined by law. [Emphasis added.]

Were we to conclude that the relevant part of Article III, Section 43, Missouri Constitution (1945), creates an exemption and is not merely a declaration of the intergovernmental tax immunity doctrine, there would necessarily be a conflict between Article III, Section 43, Missouri Constitution (1945), and Article X, Section 6.1, Missouri Constitution (1982). Construing these provisions in harmony with each other, we conclude that the words "[n]o tax shall be imposed on lands the property of the United States; . . ." in Article III, Section 43, Missouri Constitution (1945), are merely declaratory of the intergovernmental tax immunity, and these words do not create an exemption which would prevent Missouri taxation of federal lands when the United States has waived its intergovernmental tax immunity.

Samuel C. Jones, Chairman

CONCLUSION

It is the opinion of this office that the phrase "[n]o tax shall be imposed on lands the property of the United States; . ." in Article III, Section 43, Missouri Constitution (1945), is merely a declaration of the intergovernmental tax immunity doctrine and does not create a tax exemption for purposes of 7 C.F.R. Section 1955.63(f)(1)(1983). When Congress has waived its tax immunity and consented to the taxation of its lands--as it has done with regard to land owned by the Farmers Home Administration in 42 U.S.C. Section 1490h (Supp. IV 1980)--Article III, Section 43, Missouri Constitution (1945), does not preclude state or local taxation of these federal lands.

Very truly yours,



JOHN ASHCROFT
Attorney General

DEEDS:

RECORDING OF DEEDS:

Section 442.380, RSMo 1978, even if the delivery of such has been repudiated by the grantee.

Recorders of Deeds must record deeds in proper form submitted to him by a grantor pursuant to

October 6, 1983

OPINION NO. 28-83

The Honorable John G. Meyer
Perry County Prosecuting Attorney
17 North Main Street
Perryville, Missouri 63775

FILED

28

Dear Mr. Meyer:

This opinion is in response to your question asking:

If a recorder receives oral and written notice that the named grantee in a proposed deed, which is in his possession but not yet recorded, repudiates that deed and requests that it not be recorded, is the recorder no longer "authorized" to record the deed, or is the mere forwarding of a deed to the Recorder's Office by one party sufficient "authority" to place a "duty" on the Recorder to record the deed?

You state the facts giving rise to this question as follows:

A local bank demanded payment on a promissory note secured by a deed of trust recorded in the Office of the Recorder of Deeds . . . , and advised the debtors that it would foreclose under power of sale in the deed of trust if payment was not made. Debtors, who moved out of state subsequent to signing the note, through their attorney, offered to execute a Quitclaim Deed in Lieu

The Honorable John G. Meyer

of Foreclosure to the Bank in exchange for release of the debt. This offer was flatly and unequivocally rejected by the Bank due to the consequences of accepting such a deed, such as not being able to seek a deficiency judgment, possibility of junior liens, judgments against debtors, etc., which would not be cut off by such a deed but would be cut off by a trustee's sale. Bank instructed its trustee to commence advertisement for sale.

Several days after the last conversation or communication between Bank and debtors, and prior to the initiation of the advertisement of the trustee's sale, debtors, through their attorney, and without the knowledge of the Bank, forwarded a Quitclaim Deed in Lieu of Foreclosure to the Recorder of Deeds . . . , along with the necessary recording fee. This deed named the Bank as grantee. Upon receipt of the deed[,] the deputy recorder stamped the deed "Filed for Record" and entered it in the daily instrument journal. After doing so[,] she realized that the acknowledgment on the deed was not sufficient for recording in Missouri. The deed was then returned to the debtors' attorney for proper acknowledgment. All of the above took place without the knowledge of the Bank.

Several days later the attorney for the Bank[,] while reading the local newspaper, which runs the Court House news weekly, noted that a Quitclaim Deed in Lieu of Foreclosure was listed as filed from debtors to the Bank. He immediately talked with the Chairman of the Board of the Bank and the Executive Vice-President, both of whom indicated that they had no knowledge of the deed and had had no further communications with the debtors. The next day Bank's attorney went to the Recorder's Office and obtained a copy of the deed and cover letter and was told that the original had been returned for proper acknowledgment. Bank's attorney immediately orally protested the recording of the deed and explained his position to the Recorder of Deeds. The

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Recorder of Deeds and the Bank's attorney, at the request of the Recorder, came to my office for advise [sic].

I concurred with the Bank's attorney that the deed was void for lack of acceptance and delivery, however, could find no authority under the statutes to allow the recorder, in the face of the objection, to record the deed, or, despite the objection, to keep him from recording the deed. The next day the Bank's attorney sent a letter by Certified Mail, Return Receipt Requested, to debtors, their attorney, and a copy to the Recorder of Deeds, repudiating the deed. Several days thereafter the deed was returned to the Recorder's office with the proper acknowledgment for recording.

Prior to the deed['s] being returned properly acknowledged, Bank's Trustee, through Bank's attorney[,] forwarded copies of the Notice of Trustee's Sale to debtors by Certified Mail, as required by statute.

The deed remains unrecorded, but needs to be disposed of in some manner.

Section 59.330, RSMo 1978,^{1/} states in part:

It shall be the duty of recorders to record:

(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; . . .
[Emphasis added.]

1/

All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable John G. Meyer

Section 442.380 states:

Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner herein prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated.

[Emphasis added in part.]

In *Cravens, et al. v. Rossiter, et al.*, 116 Mo. 338, 22 S.W. 736, 736-737 (1893), the court stated:

The delivery of a deed is the final act, without which it cannot take effect as a transfer of the title. The delivery may be to the grantee himself, or to a third person for him. . . . In the first place, the question of delivery here does not stand on a presumption arising from the fact that the deed was recorded. The question is to be determined from all the facts disclosed by the evidence. . . . It was for him [the grantee] to say whether he would accept the deed on such terms, and until he in some way gave his assent the deed could not and did not take effect as a transfer of title. Until then there was no delivery. Indeed, the delivery of a deed is the concurrent act of two parties. The delivery of the deed to the recorder, for the purpose of having it recorded, did not amount to a delivery to the defendant, for the recorder was not the agent of defendant, and hence had no authority to accept it. . . . Recording a deed by the grantor, without the grantee's knowledge or assent, does not, of itself, operate as a delivery of the deed. . . .

[Emphasis added.]

In Missouri, the delivery of a deed to the grantee is necessary to complete the conveyance of land. As the Supreme Court stated in *McCune, et al. v. Goodwillie*, 102 S.W. 997 (Mo. 1907),

To constitute a good delivery, a deed must not only pass from the actual and constructive control of the grantor, but the grantee must accept the deed. The recording of a deed may

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be presumptive evidence of delivery, and, being for the grantee's benefit, may be presumptive evidence of acceptance, but it is a rebuttable and not a conclusive presumption in each instance. . . . [Emphasis added.] Id. at 1006.

See also **Lawson v. Rooue**, 514 S.W.2d 834 (Mo. App. 1974).

Section 442.380 requires the recordation of any instrument that may affect the legal or equitable title to real estate. We do not believe that the General Assembly intended the recorder to exercise discretion in the filing of instruments in proper form. See **Weyrauch v. Johnson**, 208 N.W. 706 (Iowa 1926) and Opinion No. 54, Long, 1938. Accordingly, the instrument in question must be recorded under Section 442.380, regardless of the meaning of the "authorized" language in Section 59.330.

CONCLUSION

It is the opinion of this office that Recorders of Deeds must record deeds in proper form submitted to him by a grantor pursuant to Section 442.380, RSMo 1978, even if the delivery of such has been repudiated by the grantee.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

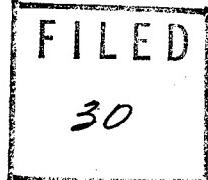
(314) 751-3321

May 23, 1983

OPINION LETTER NO. 30-83

Mr. Robert Luerding, President
School District of the City
of St. Charles
1916 Elm Street
St. Charles, Missouri 63301

Dear Mr. Luerding:



This letter is in response to your request asking:

May a Six Director School District School Board conduct a closed session dealing with and deciding on requests for leaves of absence?

In relating the facts underlying your request, you state that the leave of absence is requested for personal reasons of the teacher "for matters dealing with the personal life of the teacher and the teacher's family."

We assume for purposes of this opinion that a meeting of a six-director school district board must be an open meeting unless the exceptions contained in Section 610.025, RSMo Supp. 1982, are involved. Section 610.025.3 provides, in pertinent part:

[M]eetings relating to the hiring, firing,
disciplining, or promotion of personnel of
a public governmental body, . . . may be a
closed meeting [sic]. . . ." [Emphasis added]

We note parenthetically that the word "disciplining" was added to the quoted section by the 1982 amendments to Chapter 610.

In Hudson v. School District of Kansas City, 578 S.W.2d 301 (Mo.App. 1979), the court held that a broad construction of the phrase "relating to the hiring, firing or promotion of personnel" would allow public bodies to emasculate the provisions of the Sunshine Law since decisions relating to budgets, for example,

Mr. Robert Luerding, President

clearly "relate" to hiring, firing and promotion. Yet, in decreeing a narrow interpretation of the phrase "relating to," the court indicated that as regards an individual employee,

[W]hether the legislative intent was to protect the privacy interest of the teacher or to foster free and open discussion by Board [of personnel matters]. . . . [The legislature's purpose] can only be served if the entire employment relationship is within the exemption. Id. at 308.
[Emphasis added]

Thus, with regard to such meetings as you describe, it is our opinion that the school board may, upon proper notice, close its meeting for purposes of deciding a request for an individual employee's leave of absence, since such a decision falls within the employment relationship.

Very truly yours,


JOHN ASHCROFT
Attorney General

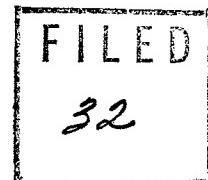
BOARD OF PROBATION AND PAROLE:
DEPARTMENT OF CORRECTIONS AND
HUMAN RESOURCES:
PROBATION AND PAROLE:
PUBLIC MEETINGS:
PUBLIC RECORDS:
SUNSHINE LAW:

Subject to exceptions contained in Chapter 217, RSMo Supp. 1982, parole hearings and parole revocation hearings of the Board of Probation and Parole are subject to the Missouri Open Meetings Law.

June 15, 1983

OPINION NO. 32-83

Lee Roy Black, Ph.D.
Director
Department of Corrections
and Human Resources
700 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Dr. Black:

This opinion is in response to your request asking whether hearings of the Board of Probation and Parole are required under the Open Meetings Law (Chapter 610, RSMo Supp. 1982) to be open to the public. We will consider in this opinion the application of the law to both parole hearings and parole revocation hearings held by the Board.

The Open Meetings Law states, in part:

[A]ll public meetings shall be open to the public and public votes and public records shall be open to the public for inspection and duplication. (Section 610.015, RSMo 1978).

The quoted portion of the statute sets the tenor for the Open Meetings Law, namely, that meetings of public bodies shall be open to the public with certain, specified exceptions. See, Wilson v. McNeal, 575 S.W.2d 802 (Mo. App. 1978).

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A threshold question is whether the Board of Probation and Parole (hereinafter "Board") is a "public governmental body" within the meaning of the Open Meetings Law. That term is defined as follows:

"Public governmental body", any legislative or administrative governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, or by executive order, including any body, agency, board, bureau, council, commission, committee, department, or division of the state, of any political subdivision of the state, of any county or of any municipal government, school district or special purpose district, any other legislative or administrative governmental deliberative body under the direction of three or more elected or appointed members having rule-making or quasi-judicial power, any committee appointed by or under the direction or authority of any of the above named entities and which is authorized to report to any of the above named entities, and any quasi-public governmental body. . . . Section 610.010(2), RSMo Supp. 1982.

The Board was assigned in 1982 to the Department of Corrections and Human Resources (Section 217.655.1, RSMo Supp. 1982). It is made up of three members appointed by the governor. It has the power to order paroles and revocations, and to issue regulations. Sections 217.655 to 217.690, RSMo Supp. 1982. As an administrative board of three appointed officials with rulemaking and quasi-judicial powers, it clearly comes within the scope of the definition of "public governmental body."

Since the Open Meetings Law states that meetings of "all" public governmental bodies must be open, unless a particular exemption exists for the Board, its hearings must be open to the public. Cohen v. Poelker, 520 S.W.2d 50 (Mo. banc 1975). A specific exemption for "proceedings involving parole" present in the original version of the Open Meetings Law was deleted in the 1982 amendments. See, House Bill 1253, 81st General Assembly. Consequently, one must search within more general provisions of the law to determine whether the hearings in question can be exempted, keeping in mind that exemptions to the law must be strictly interpreted. Hudson v. School District of Kansas City, 578 S.W.2d 301 (Mo.App. 1979).

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As we noted earlier, a portion of the Open Meetings Law deleted in 1982 provided that "proceedings involving parole may be a closed meeting, closed record, or closed vote." See, Section 610.025.1, RSMo 1978. Added at that time was a paragraph allowing closed meetings "as otherwise provided by law." Section 610.025.4, RSMo Supp. 1982. Although none of the Missouri statutes contain provisions specifically mandating a closed meeting, closed record, or closed vote for the Board, portions of the enabling legislation for the Department of Corrections and Human Resources does forbid disclosure of records which would normally be presented and discussed during the course of a parole or parole revocation hearings.

Section 217.715, RSMo Supp. 1982, provides:

The pre-parole report and the supervision history obtained in the discharge of official duties by any member or employee of the board shall be privileged and shall not be disclosed directly or indirectly to anyone other than the board, the judge of the court having jurisdiction over the defendant, or others entitled under sections 217.650 to 217.810 to receive such information, except that the board or court may at their discretion permit the inspection of the report or parts thereof by the defendant or prisoner or his attorney, or other person having a proper interest therein, whenever the best interest or welfare of a defendant or prisoner makes the action desirable or helpful.

Section 217.780, RSMo Supp. 1982, provides:

The clerk of the court shall keep in a permanent file all applications for probation or parole by the court, and shall keep in such manner as may be prescribed by the court complete and full records of all probations or paroles granted, revoked or terminated and all discharges from probations or paroles. All court orders relating to any probation or parole granted under the provisions of sections 217.010 to 217.615, 217.650 to 217.810, 558.011 and 558.026, RSMo, shall be kept in a like manner, and, if the defendant subject to any such order is under the supervision of the state board of probation and parole, a copy of the order shall be sent to the board.

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In any county where a parole board ceases to exist, the clerk of the court shall preserve the records of that board. Information and data obtained by a probation or parole officer shall be privileged information, and shall not be receivable in any court. Such information shall not be disclosed directly or indirectly to anyone other than the members of a parole board and the judge entitled to receive reports, except the court may in its discretion permit the inspection of the report, or parts thereof, by the defendant, or prisoner or his attorney, or other person having a proper interest therein, whenever the best interest or welfare of a particular defendant or prisoner makes such action desirable or helpful.

Section 217.205, RSMo Supp. 1982, provides:

Any information, report, record or document on any inmate obtained in the discharge of official duties by any employee of the division shall be privileged and confidential and shall not be disclosed directly or indirectly, except as provided in section 217.315.

We believe the quoted statutory provisions apply to Board hearings and forbid the discussion or presentation in an open hearing of pre-parole reports, and supervision histories, as well as information and data obtained by parole officers in the course of official duties. The apparent purpose of these statutes is to protect the privacy of the prisoner or parolee, as well as that of the doctor, psychiatrist or other person evaluating and investigating the prisoner or parolee. This would seem to conflict with the apparent intent of the legislature to open up the hearings of the Board. Therefore, we must harmonize the apparently contradictory provisions to give effect to both, if possible. Goldberg v. Administrative Hearing Commission, 609 S.W.2d 140 (Mo. banc 1980).

The legislature has awarded broad authority to the Board to issue regulations with respect to the conduct of its hearings. Sections 217.690.4 and 217.720, RSMo Supp. 1982. These are recorded in Chapter 14 of the Code of State Regulations. They provide that at a parole hearing a prisoner may testify, present evidence, call witnesses and be represented by the person of his choice. Additionally, the regulations allow the Board to request investigation of the prisoner's complaint as well as medical and psychological evaluations of the prisoner. 14 CSR Sections 80-2.010. The

Lee Roy Black, Ph.D.

statutes and regulations dealing with parole revocation hearings are also very broad. The legislature requires that the parole officer must present a written statement to the parolee and the Board stating that the parolee has violated the terms of his parole. Section 217.720, RSMo Supp. 1982. The regulations give the parolee the right to call witnesses and present testimony and documentary evidence as well as to confront and cross-examine adverse witnesses.

Keeping in mind the broad discretion awarded to the Board in the conduct of its hearings, we suggest that the Board issue regulations establishing bifurcated hearing procedures in keeping with the requirements of the Open Meetings Law. Such rules should allow introduction of all pre-parole reports and supervisory histories as well as all reports collected by the parole officer concerning the prisoner or parolee, during a closed segment of the hearing. Additionally, since the contents of these reports and histories would in all likelihood be discussed during the examination and cross-examination of their authors, the testimony of such authors, if called, could be heard in a closed hearing. Finally, the testimony of the parole officer must also take place in closed session. The other portions of such hearings should be open.

To reiterate, with the deletion of the particular exemption applicable to the Board by the legislature, it is manifest that no exemption exists in the law authorizing the closing of Board hearings in their entirety. When the meaning of a statute is unambiguous it must be given effect even if it produces an arguably "undesirable" result. Pedroli v. Missouri Pacific Railroad, 524 S.W.2d 882 (Mo.App. 1975).

This is an area in which two statutory provisions, enacted in the same legislative session, and to which the legislature has attached great importance, are in conflict. We believe there is a need for legislative examination of these provisions. However, absent legislative amendment, the agency responsible for implementing these provisions must reconcile them to the extent possible.

CONCLUSION

It is the opinion of this office that, subject to the exceptions contained in Chapter 217, RSMo Supp. 1982, parole and parole revocation hearings of the Board of Probation and Parole are subject to the Missouri Open Meetings Law.

Very truly yours,


JOHN ASHCROFT
Attorney General

CIRCUIT COURT:
FAMILY SERVICES, DIVISION OF:
GARNISHMENT:
MARRIAGES:
SOCIAL SERVICES, DEPARTMENT OF:

of the Missouri Division of Family Services, pursuant to Section 454.505, RSMo Supp. 1982, are "garnishments" within the meaning of the Consumer Credit Protection Act.

Both the court-ordered mandatory wage assignment pursuant to Section 452.350, RSMo Supp. 1982, and the order to withhold and pay over issued by the Director

June 9, 1983

OPINION NO. 34-83

Mr. Barrett Toan, Director
Department of Social Services
Post Office Box 1527
Jefferson City, Missouri 65102



Dear Mr. Toan:

You have requested an official opinion on the following questions:

(a) Is a court-ordered mandatory wage assignment, issued by a Missouri Circuit Court pursuant to Section 452.350 RSMo Supp. 1982, a "garnishment" as that term is defined by subchapter II of the federal Consumer Credit Protection Act, 15 USC 1671-1677?

(b) Is an order to withhold and payover, issued by the Director of the Missouri Division of Family Services pursuant to Section 454.505, RSMo Supp. 1982, and directed to an employer doing business within the state, a "garnishment" as that term is defined by subchapter II of the federal Consumer Credit Protection Act, 15 USC 1671-1677?

The statute which is the subject of your first question is included in the dissolution of marriage law, Sections 452.300 to 452.415, RSMo Supp. 1982, which was enacted in 1973, and recently amended. The parts of this law most pertinent to your question are as follows.

Mr. Barrett Toan, Director

Section 452.305, RSMo 1978, provides in pertinent part:

1. The circuit court shall enter a decree of dissolution of marriage if

* * *

(3) To the extent it has jurisdiction to do so, the court has considered, approved, or made provision for . . . , the support of any child of the marriage who is entitled to support, . . .

Section 452.340, RSMo 1978, provides in pertinent part:

In a proceeding for nonretroactive invalidity, dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents . . . to pay an amount reasonable or necessary for his support, . . .

Section 452.350, RSMo Supp. 1982, provides in pertinent part:

1. Each order for child support . . . entered by the court . . . , shall include an order directing the person obligated to pay such support . . . to assign a part of his periodic earnings or other income to the person entitled to receive the payments The assignment shall be in an amount which is sufficient to meet the periodic child support . . . payments, . . . imposed by the court and may include an additional incremental amount sufficient to defray arrearages due at the time the assignment takes effect. If the obligor fails to execute the assignment of income within ten days of being ordered to do so, the court shall enter the assignment of income on behalf of the obligor. . . .

* * *

4. An assignment . . . shall be binding on the employer or other payor, and successor employers and payors, two weeks after service upon him of notice that it has been made, . . .

Mr. Barrett Toan, Director

until further order of the court. . . . Section 432.030, RSMo, shall not apply to assignments made under this section.

5. An employer or other payor who, without good cause, fails to honor an assignment under this section may be held liable for the amount assigned. Compliance by an employer or other payor with the assignment operates as a discharge of liability to the obligor as to that portion of his periodic earnings or other income so affected.

6. As used in this section, the term "employer" includes the state and its political subdivisions. . . .

7. An employer shall not discharge or otherwise discipline an employee as a result of an income assignment authorized by this section.

The federal law to which your question is directed, the Consumer Credit Protection Act (hereinafter CCPA), Sections 1671-1677, 15 U.S.C., contains these essential provisions:

Section 1673(b), 15 U.S.C., provides in pertinent part:

(2) The maximum part of the aggregate disposable earnings of an individual for any work-week which is subject to garnishment to enforce any order for the support of any person shall not exceed--

(A) where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50 per centum of such individual's disposable earnings for that week; and

(B) where such individual is not supporting such a spouse or dependent child described in clause (A), 60 per centum of such individual's disposable earnings for that week;

* * *

Mr. Barrett Toan, Director

(c) No court of the United States or any State, and no State (or officer or agency thereof), may make, execute, or enforce any order or process in violation of such section.

Section 1672, 15 U.S.C., provides in pertinent part:

For purposes of . . . [15 U.S.C. Sections 1671-1677]:

* * *

(c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

It is our opinion that a wage assignment either ordered by a court as a part of a child support order, or actually entered by the court pursuant to Section 452.350, RSMo Supp. 1982, qualifies as a garnishment under Section 1672(c), 15 U.S.C.

In Marshall v. District Court, 444 F.Supp. 1110 (E.D. Mich. 1978), the court considered whether a wage assignment made under threat of a court order qualified as a garnishment under the CCPA:

Any order which orders or coerces a principal defendant to consent to withholding by a garnishee-defendant or prospective garnishee-defendant, or to allegedly consent voluntarily to such withholding, is for the purposes of the Act the same as an order which itself directly requires withholding." Id. at 1116.

Similarly, in In Re Marriage of Jean C. McCue, 645 P.2d 854 (Colo. App. 1982), a Colorado court decided with respect to a court-ordered assignment of wages pursuant to a divorce statute that such an order "is analogous to a garnishment and should be governed by applicable limitations on garnishment." Id. at 856. Cf. Western v. Hodgson, 494 F.2d 379 (4th Cir. 1974), where the court decided that a privately negotiated wage assignment did not constitute a garnishment within the meaning of the CCPA.

We are convinced that a circuit court-ordered assignment of wages authorized and required by Section 452.345 issued in conjunction with child support orders of the court possesses the necessary character of a "garnishment" in the sense of Sections 1671-1677,

Mr. Barrett Toan, Director

15 U.S.C., and, is, therefore, subject to the limitations in the federal law as to the maximum percent of wages or earnings of the obligor which can be so assigned.

The statute to which your second question refers was included in a 1982 enactment dealing with the enforcement of payment of child support, Sections 208.048, 454.400 and 454.520, RSMo Supp. 1982. The parts of this enactment which we consider most germane to your second question are as follows:

Section 208.040, RSMo Supp. 1982, provides in pertinent part:

1. Aid to families with dependent children shall be granted on behalf of a dependent child or children

* * *

2. The division of family services shall require as additional conditions of eligibility for benefits that each applicant for or recipient of aid:

* * *

(2) Shall assign to the division of family services in behalf of the state any rights to support from any other person such applicant may have in his own behalf or in behalf of any other family member for whom the applicant is applying for or receiving aid, and which have accrued at the time such assignment is executed;

Section 454.415, RSMo Supp. 1982, provides in pertinent part:

When a court has ordered support payments to a person who has made an assignment of support rights to the division on behalf of the state, . . . the court shall order all support payments to be made to the clerk of the court as trustee for the division

Section 454.470, RSMo Supp. 1982, provides in pertinent part:

1. At any time after the division is assigned support rights or a public assistance payment is made, the director may, if there is

Mr. Barrett Toan, Director

no court order, issue a notice and finding of financial responsibility. Such notice shall be served on the absent parent. . . . The notice shall state:

* * *

(8) That as soon as the order is entered, [by the Director of the Division of Family Services] the property of the parent will be subject to collection actions, including . . . wage withholding, garnishment, liens, and executions thereon;

Section 454.490, RSMo Supp. 1982, provides in pertinent part:

A true copy of any order entered by the director . . . , may be filed in the office of the circuit court clerk in the county in which either the parent or the dependent child resides. Upon filing, the clerk shall enter the order in the judgment docket. Upon docketing, the order shall have all the force, effect, and attributes of a docketed order or decree of the circuit court, including, . . . , lien effect and enforceability by supplementary proceedings, contempt of court, execution, and garnishment.

Section 454.505, RSMo Supp. 1982, provides in pertinent part:

1. [I]f an order has been entered by the director . . . , and an arrearage exists on the payments required, the director may, . . . issue an order directing any employer or other payor of the parent to withhold any [sic] pay over to the division . . . , money due or to become due the obligated parent in an amount not to exceed federal wage garnishment limitations, until all arrearages under such administrative order are paid in full. Thereafter, the amount ordered to be paid shall be withheld from amounts due . . . the parent at each pay period.

* * *

Mr. Barrett Toan, Director

5. An order . . . shall be a continuing order and shall . . . be binding upon any employer or other payor upon whom it is directed until a further order of the director. . . .
[Emphasis added.]

We are satisfied that an order issued by the Director of the Division of Family Services to an employer or other payor of a person who has been determined delinquent in child support payments is a "legal or equitable procedure" of the sort that Congress had in mind when enacting the monetary limits on garnishments in the CCPA. While we are unable to find any cases dealing particularly with the acts' application to state administrative orders to withhold and pay over wages, such orders clearly fall within the expansive definition of "garnishment" contained in Section 1672(c), 15 U.S.C.: "a legal . . . procedure through which the earnings of any individual are required to be withheld for the payment [of] a debt." It is also significant, in terms of this question, that in 1977 Congress amended Section 1673(c) to prohibit the making, execution or enforcement of orders or processes, in violation of Section 1673, by states, state officers and state agencies," whereas previously it applied only to state and federal courts. Finally, it is patent that the Missouri legislature intended the federal limitations on the withholding of wages to apply. See Section 454.505, RSMo Supp. 1982.

CONCLUSION

It is the opinion of this office that both the court-ordered mandatory wage assignment pursuant to Section 452.350, RSMo Supp. 1982, and the order to withhold and pay over issued by the Director of the Missouri Division of Family Services, pursuant to Section 454.505, RSMo Supp. 1982, are "garnishments" within the meaning of the Consumer Credit Protection Act.

The foregoing opinion, which I hereby approve, was prepared by my assistants, Louren R. Wood and Anne Shapleigh.

Very truly yours,


JOHN ASHCROFT
Attorney General

LAKE CONTRARY:

LAKES:

NAVIGABLE STREAMS AND WATERS:

STATE WATERS:

WATER PATROL:

Based upon the information available to this office with respect to the dates and manner in which the various lakes which you have inquired about were formed, Bean, Contrary, Sugar and Big Lakes are waters of this state within the definition of Section 306.010(7), RSMo Supp. 1982, for purposes of determining the jurisdiction of Missouri State Water Patrolmen for enforcement of Missouri statutes on those bodies of water. It is further the opinion of this office that it is at this time impossible to determine the ownership of the lake bed of South Lake, and therefore this office declines to issue a formal opinion with respect thereto.

December 29, 1983

OPINION NO. 35-83

Edward D. Daniel, Director
Department of Public Safety
621 East Capitol Avenue
Jefferson City, Missouri 65101

35

Dear Mr. Daniel:

This official opinion is issued in response to the following question:

Whether the Ox Bow Lakes, Northwest Missouri (along the Missouri River), specifically Bean, Sugar, Contrary, South and Big Lakes, are waters of this state? (The answer to which will determine if the Missouri State Water Patrol can enforce state laws on these waters.)

The answer to your question is determined by the definition of "waters of the state" found in Section 306.010(7), RSMo Supp. 1982. The authority of water patrolmen, employed by the Division of Water Safety, is set forth in Section 306.165, RSMo 1978, in terms of the "waterways of this state." Section 306.010(7), supra, defines "waters of this state" as:

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[A]ny waters within the territorial limits of this state and lakes constructed or maintained by the United States Army Corps of Engineers except bodies of water owned by a person, corporation, association, partnership, municipality or other political subdivision, public water supply impoundments, and except drainage ditches constructed by a drainage district, but the term does include any body of water which has been leased to or owned by the state department of conservation.

The authority of water patrolmen is limited in Section 306.165 to waterways of this state and areas of land bordering said waterways. Chapter 306 contains additional references to "waters of this state" when defining water safety violations, e.g., Sections 306.130 and 306.190, RSMo 1978.

The definition of waters of this state was changed by the legislature in 1979 and the requirement of navigability was removed. Section 306.010(7), supra. Currently, any waters within the borders of the State of Missouri which do not fall within one of the exceptions enumerated in Section 306.010(7), supra, are waters of this state. To answer your question, it must be determined whether or not Bean, Sugar, Contrary, South and Big Lakes are bodies of water owned by a person, corporation, association, partnership, municipality, or other political subdivision, public water supply impoundments or are drainage ditches.

It is this office's understanding that the "Ox Bow" Lakes were formed by sudden changes in the main channel of the Missouri River which rendered the lakes from the previous main river channel. Several of these "sudden changes" formed the bases for litigation over land titles and state boundaries.

[I]n 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. . . . [T]he centre line of the old channel . . . became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel. Nebraska v. Iowa, 143 U.S. 359, 370, 12 S.Ct. 396, 400, 36 L.Ed. 186 (1892).

[O]n . . . July 5, 1867 . . . within twenty-four hours and during a time of very high water, the river, which had for years passed around what is called McKissick's Island, cut a new channel across and through the narrow

Edward D. Daniel, Director

neck of land at the west end of Island Precinct (of which McKissisck's Island formed a part), about a half mile wide, making for itself a new channel . . . After that change the river ceased to run around McKissisck's Island. Missouri v. Nebraska, 196 U.S. 23, 34 25 S.Ct. 155, 157, 49 L.Ed. 372 (1904).

When new states are admitted into the Union, title to land under all navigable waters within such states pass to the new state. For example, through congressional grant at the time of entry into the Union, the admitted state would take title to the river bed under a navigable river. If the waters are not navigable in fact, the title of the land underlying them is unaffected by the formation of the new state and remains in the United States. United States v. Oregon, 295 U.S. 1, 14, 55 S.Ct. 610, 615, 79 L.Ed. 1267 (1935). Additionally, an avulsion, or sudden change in a river bed, does not change title to the river bed although the channel may have changed. Missouri v. Nebraska, 196 U.S. at 35-36.

The boundaries of the State of Missouri were changed in 1836 to extend to the Missouri River on the west in the areas now occupied by Atchison, Holt and Buchanan Counties. 5 Stat. at Large 34, Chapter 86 ("An Act to Extend the Western Boundary of the State of Missouri to the Missouri River"). At the time of this extension of boundaries, the State of Missouri took title was the river bed of the Missouri River. Missouri v. Nebraska, 196 U.S. at 26-27. The basis for the state's assumption of title is that at the time of the 1836 grants of lands by Congress and the admission of Missouri into the Union the Missouri River was navigable. Cooley v. Golden, 117 Mo. 33, 44-47, 23 S.W. 100, 104-105 (Mo. banc 1893). With these legal principles in mind, we will address the status of each lake included in your inquiry.

In the case of Schreve v. Boil, which was not appealed, the Circuit Court of Buchanan County found that Lake Contrary, although formed prior to 1821 when Missouri was admitted into the Union, was a navigable lake at the time of admission into the Union and therefore title thereto passed to the State. Thus, your question with respect to Lake Contrary must be answered in the affirmative in that it has already been determined by a court of competent jurisdiction that the lake is a "water of this state", and therefore the Water Patrol has the authority to enforce the laws of the State of Missouri upon that lake.

This office has previously issued opinions with respect to Bean and Big Lake and the ownership of those bodies of water. Opinion Nos. 10 (1971) and 275 (1965). Copies of those opinions are attached for your consideration. As is pointed out in Opinion

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No. 371 (1967), the time at which Bean Lake was formed is unknown. However, a number of the Ox Bow Lakes were formed in the late 1890s during great floods at that time, as well as during the 1867 flood. If an assumption is made that Bean Lake was formed after Missouri became a state, and was a part of the Missouri River channel at that time, title thereto vested in the state and Bean Lake would not fall within one of the exceptions of waters of the state set forth in Section 306.010(7), supra. Even if one presumes that Bean Lake was formed prior to 1821, this conclusion would not change given the rationale contained in Schreve v. Boil, supra. Given the current size and character of Bean Lake, it is reasonable to assume that it was navigable in fact at the time Missouri entered the Union.

In July, 1965, this office issued an opinion, No. 242, regarding the rightful and legal ownership of the real estate known as Big Lake. At the time of the issuance of this opinion, this office did not have information with respect to the time during which the Big Lake was formed from the Missouri River channel. Big Lake is located in an area known as the Plat Purchase which was joined to the state in 1837. If Big Lake was, at that time, part of the main river channel, title to its bed would have passed to the State of Missouri and it would be a water of this state for purposes of the Department of Public Safety's jurisdiction. Assuming that Big Lake was formed after 1837, the answer to your question regarding that lake's status as a water of the state would be answered in the affirmative.

Sugar Lake is located "by" the Lewis and Clark State Park. A perusal of a survey map of the area reveals that Sugar Lake is an "Ox Bow" Lake that at one time was a part of the Missouri Channel. No information as to when the lake was formed is available. However, the State of Missouri holds title to several plots of land bordering upon the lake. Even if one were to assume that the Lake was formed prior to 1821 and was not navigable in fact so that Missouri would not have taken title to the lake bed at that time, as a littoral land owner, Missouri would own a portion of the lake bed which would preclude the lake from coming within any exception contained in Section 306.010(7), supra. We therefore conclude that Sugar Lake is a water of the State for purposes of law enforcement authority.

This office has not previously issued any opinions with respect to South Lake in the Ox Bow chain. No information is available which could be relied upon to determine the ownership of South Lake at this time. To determine whether or not the United States retained title to these lands which it would have then passed on to subsequent owners through patents would require an extensive examination of the titles of each riparian land owner at South Lake. As it is at this time impossible to determine the

Edward D. Daniel, Director

ownership of South Lake, this office declines to issue an opinion which respect to that question. If one assumes that the lake was formed following a congressional grant of the Missouri River channel, the lake would, as Bean, Contrary, and Big, be state waters and subject to the jurisdiction of the Missouri Water Patrol. If the lake was formed prior to the grant of land, but was navigable in fact as Lake Contrary, then it would also be a water of this State as defined in Section 306.010(7), supra.

CONCLUSION

It is the opinion of this office, based upon the information available to it with respect to the dates and manner in which the various lakes which you have inquired about were formed, that Bean, Contrary, Sugar and Big Lakes are waters of this state within the definition of Section 306.010(7), RSMo Supp. 1982, for purposes of determining the jurisdiction of Missouri State Water Patrolmen for enforcement of Missouri statutes on those bodies of water. It is further the opinion of this office that it is at this time impossible to determine the ownership of the lake bed of South Lake, and therefore this office declines to issue a formal opinion with respect thereto.

Very truly yours,



JOHN ASHCROFT
Attorney General

APPROPRIATIONS:
SCHOOL FOR THE DEAF:
SCHOOL FOR THE BLIND:
SCHOOLS FOR SEVERELY
HANDICAPPED CHILDREN:
STATE BOARD OF EDUCATION:

Appropriated funds from the School for the Blind Trust Fund, the School for the Deaf Trust Fund, and the Handicapped Children's Trust Fund, if not earmarked by the donor for a special purpose, may be used to provide operating money for the school to which the funds were donated if the request for funds from general revenue has resulted in an appropriation from general revenue which is less than requested.

January 20, 1983

OPINION NO. 36

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Post Office Box 480
Jefferson City, Missouri 65102-0480



Dear Dr. Mallory:

This is in response to your request for an official opinion on the following question:

For what purposes may the State Board of Education expend moneys in the School for the Blind, School for the Deaf, and Handicapped Children's Trust Funds? Specifically, can this money, if not earmarked by the donor for a special purpose, be used to provide normal operating money for the School for the Blind, the School for the Deaf, and the Schools for the Severely Handicapped because the Legislature did not appropriate enough general support or failed to fund an operating program?

The School for the Blind, School for the Deaf, and Handicapped Children's trust funds are established in Section 162.790, RSMo 1978. Subsections 1, 2, and 3 of Section 162.790 provide that all funds derived from grants, gifts, donations, or bequests or from the sale or conveyance of any property acquired through any grant, gift, donation, devise, or bequest to or for the use of the Missouri School for the Blind, Missouri School for the Deaf,

Dr. Arthur L. Mallory

or state schools for severely handicapped children may be deposited in the state treasury in funds known as the "School for the Blind Trust Fund", "School for the Deaf Trust Fund", and "Handicapped Children's Trust Fund." Subsection 4 of Section 162.790 provides as follows:

The moneys in the school for the blind trust fund, in the school for the deaf trust fund or in the handicapped children's trust fund shall not be appropriated for the support of the schools in lieu of general state revenues but shall be appropriated only for the purpose of carrying out the objects for which the grant, gift, donation, devise or bequest was made.

We assume that appropriations are available from the trust funds.

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent, if possible, and to consider words used in the statute in their plain and ordinary meaning. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). Furthermore, where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose. State ex rel. State Building Commission v. Smith, 81 S.W.2d 613 (Mo. 1935).

Section 162.790 clearly provides that the moneys in the School for the Blind, School for the Deaf, and Handicapped Children's trust funds are funds that are held in trust for the various schools. Assuming that the gifts made are not for a special purpose, such funds may be used to provide normal operating money for the schools. In this respect we call your attention to two previous opinions of this office. In Opinion No. 63, dated April 30, 1968, to Howard, this office stated:

[M]oney in the School for the Blind Trust Fund derived from conveyances to the fund which do not specify any purpose for which the funds may be used can be appropriated and expended by the Board of Education for the purchase of land and construction of buildings for the School for the Blind if request for funds from general revenue for such purchase has resulted in an appropriation from

Dr. Arthur L. Mallory

general revenue less than the Board has requested as necessary for such purchase and that such expenditures are for the normal operation of the School for the Blind.

Similarly, in Opinion No. 134, dated September 27, 1977, to Mallory, this office stated that School for the Blind trust funds may be used to finance a School for the Blind facility assuming that the funds were not used contrary to a special gift.

Conclusion

It is the opinion of this office that appropriated funds from the School for the Blind Trust Fund, the School for the Deaf Trust Fund, and the Handicapped Children's Trust Fund, if not earmarked by the donor for a special purpose, may be used to provide operating money for the school to which the funds were donated if the request for funds from general revenue has resulted in an appropriation from general revenue which is less than requested.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Leslie Ann Schneider.

Very truly yours,



JOHN ASHCROFT
Attorney General

Encs: Op. No. 63,
4/30/68, Howard
Op. No. 134,
9/27/77, Mallory

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JOHN ASHCROFT
ATTORNEY GENERAL

September 22, 1983

Second Addendum to Opinion Letter No. 41

Fred A. Lafser, Director
Department of Natural Resources
1915 Southridge Drive
Jefferson City, Missouri 65101

Dear Mr. Lafser:

This letter constitutes a second addendum to Opinion Letter No. 41-83 and the memorandum opinion attached thereto, dated January 31, 1983. This letter, along with Opinion Letter No. 41-83 and the first Addendum to Opinion Letter No. 41-83, dated July 12, 1983, constitute the Attorney General's statement required by 40 CFR 271.125 (formerly 40 CFR 123.125) as part of the application for interim authorization submitted to the U.S. Environmental Protection Agency by the Missouri Department of Natural Resources pursuant to 40 CFR Part 271, Subpart F (formerly 40 CFR Part 123, Subpart F).

You have requested this addendum because EPA has requested further clarification on five matters. We will separately state and answer each question prompted by the federal agency's request for clarification.

1. Is the term "criteria" as used in Section 260.370.3(1)(a) equivalent to the term "characteristics" as used in 40 CFR Part 261, Subpart C, so as to authorize the Hazardous Waste Management Commission to adopt the characteristics regulations at 10 CSR 25-4.010(2)-(5)?

It is our opinion that the term criteria, as used in Section 260.370.3(1)(a), RSMo Supp. 1982, and the term characteristics, as used in the federal regulations at 40 CFR Part 261, Subpart C, are equivalent in meaning, and that Section 260.370.3(1)(a) does

Fred A. Lafser, Director

authorize the Hazardous Waste Management Commission to adopt the hazardous characteristics regulations found at 10 CSR 25-4.010(2)-(5). Webster's New International Dictionary, Second Edition (1952), defines criterion as "a characteristic mark or trait." The term characteristic is defined in the same publication as "a trait, quality or property distinguishing an individual, group or type." Thus, it is clear that the two terms are essentially synonymous.

As noted at page 3 of the memorandum accompanying Opinion Letter No. 41-83, the hazardous characteristics regulations at 10 CSR 25-4.010(2)-(5) are substantially identical to the federal characteristics regulations at 40 CFR 261.21-.24. Section 260.370.3(1)(a) authorizes the Hazardous Waste Management Commission to adopt regulations "establishing criteria and a listing for the determination of whether any waste or combination of wastes is hazardous. . . ." We believe that as criteria and characteristics are essentially synonymous terms, Section 260.370.3(1)(a) authorizes the Commission to adopt regulations setting forth characteristics by which a waste is deemed hazardous, as was done at 10 CSR 25-4.010(2)-(5).

2. Does Section 260.370.3(1)(a) authorize the Hazardous Waste Management Commission to adopt the lists of hazardous wastes found at 10 CSR 25-4.010(6)?

Section 260.370.3(1)(a), RSMo Supp. 1982, provides that the Hazardous Waste Management Commission shall adopt regulations "establishing criteria and a listing for the determination of whether any waste or combinations of wastes is hazardous. . . ." We specifically stated at page 4 of the memorandum accompanying Opinion Letter No. 41-83 that this provision authorizes the Commission to adopt the lists of hazardous wastes found at 10 CSR 25-4.010(6). We understand the Environmental Protection Agency to now ask whether a listing for the determination of whether a waste is hazardous is the same as a list of hazardous wastes.

We frankly do not understand why EPA is having difficulty understanding this provision. A "listing" could involve nothing more than the development of one or more lists. The lists authorized by the legislature are to be used to determine whether a waste is hazardous. An obvious way in which this mandate can be achieved is by promulgating lists of wastes which will be deemed hazardous, either by chemical name, or by reference to the process or source by which the waste is generated, as EPA has done at 40 CFR 261.31-.33, and as the Commission has done at 10 CSR 25-4.010(6). We think it abundantly clear that Section 260.370.3(1)(a) authorizes the lists contained in 10 CSR 25-4.010(6).

Fred A. Lafser, Director

3. Does the exemption from facility permitting contained in Section 260.395.13(2) affect any exclusion of domestic sewage from the scope of substances regulated as hazardous waste under Sections 260.350 to 260.430, as does 40 CFR 261.4(a)(1)?

We understand that this question was prompted by a question posed by EPA, as follows: "Is Section 260.395.13(2) equivalent to and no less stringent than the RCRA domestic sewage exemption?" Your staff has expressed to us, and we agree, that the question posed by EPA asks for a comparison of legally dissimilar provisions, and is not relevant to the essential question whether the state program controls a universe of hazardous wastes nearly identical to that controlled under the federal regulations at 40 CFR Part 261. See 40 CFR 271.128(a).

Section 260.395.13(2), amended by H.B. 528, 82nd General Assembly, effective June 27, 1983, provides for an exemption from facility permitting requirements for publicly-owned treatment works (POTWs), so long as certain conditions are met. This exemption says nothing about whether the substances coming to the treatment plant are or are not hazardous wastes. It simply says that so long as the specified conditions are met, the POTW need not obtain a hazardous waste facility permit.

On the other hand, the federal domestic sewage exemption referenced in EPA's question does affect the universe of waste regulated. Under 40 CFR 261.4(a)(1), solid waste does not include domestic sewage, or mixtures of domestic sewage and other wastes discharged to POTWs. A material must qualify as a solid waste before it can be considered as a hazardous waste. 40 CFR 261.1(a) and 261.3(a). Therefore, under federal regulations a waste which could otherwise be considered a hazardous waste will escape regulation under the Resource Conservation and Recovery Act (RCRA) once it is discharged into a sewer system tributary to a POTW, thus excluding such waste from the universe of waste regulated under the federal program.

In summary, the exemption from facility permitting requirements contained in Section 260.395.13(2) affects no exclusion of domestic sewage from the universe of substances regulated as hazardous waste under the state regulatory program.

4. Does the definition of "waste" at Section 260.360(17) use the term "material" in its generic sense, so as to subject materials to regulation as waste if those materials are sometimes discarded, as is provided in 40 CFR 261.2(b)(2) and (3), or does Section 260.360(17) have reference to material in the specific sense, such that the person in possession of the material must form an intent to discard the material before it becomes a waste?

Fred A. Lafser, Director

Section 260.360(17), RSMo Supp. 1982, defines waste as

Any material for which no use or sale is intended and which will be discarded or any material which has been or is being discarded. "Waste" shall also include certain residual materials, to be specified by the rules and regulations, which may be sold for purposes of energy or materials reclamation, reuse or transformation into new products which are not wastes.

EPA regulations at 40 CFR 261.2 use the term solid waste, rather than waste. Subsection (a) defines solid waste as "any garbage, refuse, sludge or any other waste material which is not excluded under § 261.4(a)." Subsection (b) of 40 CFR 261.2 contains definitions of "other waste material." Among those definitions are paragraphs (b)(2) and (b)(3), which specify that the described material "sometimes is discarded".

We understand EPA's concern to be that the definition of waste as contained in Section 260.360(17) may refer to materials only in what EPA characterizes as a specific sense, that is, only where the generator has formed an intention to discard materials, rather than in the generic sense as used in the federal regulations, where a particular material is always a waste, because that material is sometimes discarded by generators. We believe that the legislature used the term material in Section 260.360(17) in its generic sense, with reference to classes of substances, not with reference to the substances as specifically handled by individual generators, transporters and facility operators.

While the first sentence of Section 260.360(17) may be somewhat ambiguous on this point, the second sentence of the definition of waste makes it clear that the legislature is speaking in the generic sense. The legislature could not have intended to require the Hazardous Waste Management Commission to adopt regulations specifying residual materials in the hands of individual generators, transporters or facility operators, in order to be able to regulate such materials as waste. Instead, we think it clear that the legislature envisioned that the Commission would designate those residual materials by generic class or type, and that the materials, once designated, would be subject to regulation without regard to the specific intentions of the particular generator, transporter or operator.

We do not believe that the legislature would have used the term material in the first sentence of Section 260.360(17) in a diametrically different sense than used in the second sentence of that provision. Further, remedial statutes such as Sections 260.350 to 260.430 are to be given a liberal construction, so as to meet the cases which are clearly within the spirit and reason

Fred A. Lafser, Director

of the law, and so as to meet the evil which the statutes are designed to remedy, resolving all doubts in favor of applicability of the statutes to particular cases, provided that such interpretation is not inconsistent with the language used. State ex rel. LeFevre v. Stubbs, 642 S.W.2d 103 (Mo. banc 1982). Interpreting Section 260.360(17) to apply to materials in the generic sense is not inconsistent with the language used in the provision. Such a construction has the effect of bringing within the scope of the regulatory program the broadest range of hazardous substances, thus furthering the legislative goal of protecting the public health and the environment from the dangers of hazardous wastes.

We believe that the definition of waste as contained in Section 260.360(17) is as broad as the definition of solid waste in 40 CFR 261.2, and with specific reference to the question raised by EPA, is as broad as the definition of "other waste material" found in 40 CFR 261.2(b). We believe that Section 260.360(17), in regulating discarded and residual materials in their generic sense, covers materials which are sometimes discarded, as well as those materials which are routinely or always discarded. Thus, the state term "waste" and the federal term "solid waste" are equivalent.

5. May the Hazardous Waste Management Commission promulgate regulations containing requirements adopted by reference from federal regulations?

The Hazardous Waste Management Commission is given broad rulemaking authority in a number of areas of hazardous waste regulation, which need not be detailed here. Nowhere in Sections 260.350 to 260.430, RSMO, is the subject of rulemaking by adoption by reference addressed, either expressly or by implication. However, we are aware that it has been the common practice for a number of years for administrative agencies, both at the state level and at the federal level, to adopt provisions by reference in their regulations. The Missouri legislature is aware of this practice, and obviously approves thereof. Section 536.021.2(3), RSMO 1978, in setting forth procedures for rulemaking by administrative agencies, provides, inter alia, that "[a] proposed rule may incorporate by reference only if the material so incorporated is retained at the headquarters of the state agency. . . ." It is clear from this provision that the legislature has anticipated that administrative agencies will use the procedure of adoption by reference, and that the legislature approves of such practice. We think that the practice of adoption by reference is authorized under Missouri law.

Fred A. Lafser, Director

The above clarifications do not alter the opinions expressed in Opinion Letter No. 41-83, dated January 31, 1983, or the First Addendum to that opinion letter, dated July 12, 1983.

Sincerely,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

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JEFFERSON CITY, MISSOURI 65102

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JOHN ASHCROFT
ATTORNEY GENERAL

July 12, 1983

ADDENDUM TO OPINION LETTER NO. 41

Fred A. Lafser, Director
Department of Natural Resources
1915 Southridge Drive
Jefferson City, Missouri 65101

Dear Mr. Lafser:

This letter constitutes the addendum to Opinion Letter No. 41-1983 and the memorandum opinion attached thereto, dated January 31, 1983, and together constitute the Attorney General's statement required by 40 CFR § 123.125, as part of the application for interim authorization submitted to the U. S. Environmental Protection Agency by the Missouri Department of Natural Resources pursuant to 40 CFR Part 123, Subpart F.

You requested this addendum because EPA has requested clarification of the following points:

(1) The exemption for radioactive wastes contained in Section 260.355(1), RSMo 1978, and

(2) The statutory authority for the regulation of interim status facilities.

Section 260.355, RSMo 1978, sets forth, in five subdivisions thereof, categories of waste which are exempted from regulation under the Missouri Hazardous Waste Management Law. Subdivision (1) exempts "[r]adioactive wastes regulated by laws of the federal government or of this state." Section 1004(27) of RCRA and 40 CFR § 261.4(a)(4) exclude from coverage under the federal program "source, special nuclear or by-product materials as defined by the Atomic Energy Act of 1954, as amended."

Generally, exceptions in a statute should be strictly construed and all doubts should be resolved in favor of the general provision rather than the exceptions thereto. City of Nevada v. Bastow, 328 S.W.2d 45 (Mo.App., K.C.D. 1959). This office discerns no clear intent in the language of Section 260.355 to

Fred A. Lafser
July 12, 1983
Page Two

wholly exempt wastes which may have other hazardous characteristics in addition to radioactivity. Therefore, in light of the broad goal of protection of public health and the environment expressed in Sections 260.350 to 260.430, RSMo, this office is of the opinion that Section 260.355(1) only prohibits regulation of the radioactive characteristic of a radioactive waste and does not prohibit regulation of a radioactive waste as a hazardous waste by virtue of some other non-radioactive, hazardous characteristic of such waste. Since under EPA regulations a waste is not regulated as hazardous by virtue of its radioactivity, Section 260.355(1) does not exclude from coverage any waste which is presently covered under the federal program.

Section 260.395.14, RSMo, House Bill 528, 82nd General Assembly, effective June 27, 1983, provides as follows:

The owner or operator of any hazardous waste facility in existence on September 28, 1977, who has achieved federal interim status under 42 U.S.C. §6925(e), and who has submitted to the department Part A of the federal facility permit application, may continue to receive and manage hazardous wastes in the manner as specified in the Part A application, and in accordance with federal interim status requirements, until completion of the administrative disposition of a permit application submitted pursuant to sections 260.350 to 260.430. The department may at any time require submission of, or the owner or operator may at any time voluntarily submit, a complete application for a permit pursuant to sections 260.350 to 260.430 and commission regulations. The authority to operate under this subsection shall cease one hundred eighty days after the department has notified an owner or operator that an application for permit pursuant to sections 260.350 to 260.430 must be submitted, unless within such time the owner or operator submits a completed application therefor. Upon submission of a complete application, the authority to operate under this subsection shall continue for such reasonable time as is required to complete the administrative disposition of the permit application. If a facility loses its federal interim status, or the Environmental Protection Agency requires the owner or operator to submit Part B of the federal application, the department shall notify the owner or operator that an application for a permit must be submitted pursuant to this subsection. In addition to compliance with the federal interim status requirements, the commission shall have the authority to adopt regulations requiring persons operating under the authority of this subsection to meet additional state interim status requirements.

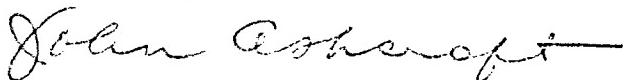
Fred A. Lafser
July 12, 1983
Page Three

This statutory provision specifically authorizes facilities in existence on September 28, 1977, to operate under "interim status," in lieu of a permit, until administrative processing of a permit application is completed, subject to requirements for submittal of a complete application pursuant to Section 260.395.14. The provision also requires a facility operating thereunder to achieve federal interim status under 42 U.S.C. §6925(e), submit to the Department of Natural Resources Part A of the federal facility permit application, and to receive and manage hazardous wastes in the manner specified in the Part A application and in accordance with federal interim status requirements. Inasmuch as the statutory provision incorporates by reference the federal interim status requirements and requires compliance therewith, Section 260.295.14 is consistent with the federal interim status provisions, 40 CFR Part 265, and 40 CFR § 122.23.

We do not address in this addendum letter, as we were not requested to do so, any other matters which may be affected as a result of the passage of House Bill 528, 82nd General Assembly.

The above clarifications do not alter the opinions expressed in Opinion Letter No. 41-1983, dated January 31, 1983.

Sincerely,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

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JOHN ASHCROFT
ATTORNEY GENERAL

January 31, 1983

OPINION LETTER NO. 41-83

Fred A. Lafser
Director
Department of Natural Resources
1915 Southridge Drive
Jefferson City, Missouri 65101

Dear Mr. Lafser:

FILED

41-83

This letter, and the attached Memorandum Opinion prepared by my assistant, Dan Summers, which I approve, constitute the Attorney General's statement required by 40 CFR 123.125 as part of the Application for Interim Authorization submitted to the U.S. Environmental Protection Agency by the Missouri Department of Natural Resources pursuant to 40 CFR Part 123, Subpart F. In my opinion the laws of the State of Missouri, as discussed in the attached Memorandum Opinion, provide adequate authority to carry out the state's program for the regulation of hazardous waste, as set forth in the state's Application for Interim Authorization respecting Phase I and Phase II, Components A and B, of the federal program. The enabling legislation for the state's program was in existence prior to the July 26, 1982 announcement of the final component of the federal program. The authorities discussed in the attached Memorandum Opinion are contained in statutes and regulations lawfully adopted and in force prior to the date of this letter, except that amendments to certain Air Conservation Commission regulations, necessary to the effectiveness of the Hazardous Waste Management Commission's particulate emission limitation for incinerators, will not be in effect until May 12, 1983. In my opinion the Authorization Plan submitted as part of the state's Application will, if carried out, provide the State of Missouri with the authority to meet the requirements for final authorization under Phase I and Phase II, Components A and B, of the federal hazardous waste program, based on current federal regulations.

Sincerely,


JOHN ASHCROFT
Attorney General

MEMORANDUM OPINION

TO: John Ashcroft, Attorney General
FROM: Dan Summers, Assistant Attorney General
DATE: January 31, 1983
RE: Opinion Request No. 41

The Director of the Department of Natural Resources has asked this office to provide our opinion whether the state program for the regulation of the generation, transportation, storage, treatment and disposal of hazardous wastes under §§ 260.350 to 260.430, RSMo, and the Hazardous Waste Management Commission regulations adopted under that law, are equivalent to the regulatory program developed by the federal Environmental Protection Agency (EPA) pursuant to the Resource Conservation and Recovery Act, PL 94-580, as amended by PL 96-482 (RCRA). Our opinion is required under 40 CFR 123.125, as part of Missouri's application for interim authorization under RCRA to administer the federal program for regulation of hazardous wastes. See 42 USCA § 6926(c) and 40 CFR Part 123, Subpart F.

Interim authorization has been divided by EPA into four parts, denominated as Phase I, and Phase II, Components A, B and C. Phase I refers to the identification and listing of hazardous wastes, regulation of the generation and transportation of those wastes, and the regulation of treatment, storage and disposal facilities under interim status regulations found at 40 CFR Part 265. Phase I does not require the issuance of permits to hazardous waste management facilities. Phase II involves the issuance of permits to treatment, storage and disposal facilities pursuant to standards at 40 CFR Part 264. Phase II, Component A, refers to storage facilities using containers or tanks, and facilities treating wastes in tanks. Phase II, Component B, refers to treatment of wastes in incinerators. Phase II, Component C, refers to storage, treatment or disposal of wastes in surface impoundments, waste piles, landfills, and land treatment units. Missouri is currently applying for interim authorization for Phase I and Phase II, Components A and B, but not for Component C. Therefore, our opinion does not address the federal standards applicable in the process of permitting Component C facilities.

This memorandum was developed in the format requested by EPA. Each of the statements appearing as a part or subpart heading is found in the EPA format furnished us. A few minor changes have been made in these statements for the purpose of

clarity, due to the fact that EPA realigned the grouping of facilities within the various components of Phase II after the format was furnished to us. Parts I through VIII of this memorandum deal with Phase I of the federal program, whereas Parts IX through XI deal with Phase II, Components A and B.

PREFATORY NOTE AS TO DATE OF ENABLING LEGISLATION

The State of Missouri undertook to regulate the generation, transportation, treatment, storage and disposal of hazardous waste in §§ 260.350 to 260.430, RSMo 1978, the Missouri Hazardous Waste Management Law. The law was adopted in H.B. 318, 79th General Assembly, and became effective September 28, 1977. The 1977 Act provides the enabling legislation for the State of Missouri to carry out the hazardous waste management program discussed in detail throughout this memorandum.

In 1980, the Missouri Legislature adopted H.B. 5, 6 and 4, 80th General Assembly, Second Extraordinary Session. H.B. 5, 6 and 4 amended every section of the Missouri Hazardous Waste Management Law except §§ 260.350, 260.355, 260.385, and 260.410. The legislature also added three new sections, 260.372, 260.377, and 260.391. H.B. 5, 6 and 4 became effective on October 31, 1980. Thus, all state enabling legislation was in place well before the July 26, 1982 announcement of the final component of Phase II of the federal program, as required by 40 CFR 123.125(a) and 123.128(d).

In the format of this opinion we are asked by EPA to make a specific citation in each part or subpart to state laws discussed under that part. For the sake of brevity, all citations to Chapter 260, Revised Statutes of Missouri, will be made without reference to whether the statute appears in RSMo 1978, or in H.B. 5, 6 and 4, which is found in RSMo Supp. 1982. It should be understood throughout that §§ 260.350, 260.355, 260.385 and 260.410 are to be found in RSMo 1978, and §§ 260.360 to 260.380, 260.390 to 260.400, and 260.415 to 260.430 are to be found in RSMo Supp. 1982.

I. IDENTIFICATION AND LISTING

RCRA § 3001(b), 42 USC § 6921

State statutes and regulations provide control over a universe of hazardous waste generated, transported, treated, stored and disposed of in the state at the time of program approval which is nearly identical to that which would be controlled by the federal program under 40 CFR 261. (See 40 CFR 123.128(a)).

Citation of Laws and Regulations

Sections 260.355, 260.360, and 260.370; 10 CSR 25-4.010 and 5.010

Explanation of Legal Authority

A. Definition of Hazardous Waste.

The term "hazardous waste" is defined in § 260.360(9). Comparison of this definition to the definition of the same term in § 1004(5) of the Resource Conservation and Recovery Act (RCRA), as amended, reveals that the state definition parallels the federal definition, both in terms of the characteristics of the waste, and in terms of the injurious effects which may result. The federal definition references "solid waste", but the definition of this term in § 1004(27) of RCRA makes it clear that semi-solid, liquid and contained gaseous materials are also covered under the federal program. Coverage of the federal program extends to all "discarded" materials in whatever form, with the exceptions set out in § 1004(27). The state definition of "hazardous waste" does not refer to solid waste. Instead, the term "any waste or combination of wastes" is used. Section 260.360(9). "Waste" is defined in § 260.360(17) as "any material for which no use or sale is intended and which will be discarded, or any material which has been or is being discarded." Waste also includes residual materials which may be sold for energy production or for reclamation, reuse or transformation into new products. We believe that the term "waste", as used in the Missouri statute, has a coverage at least as broad as that of the term "solid waste" as used in RCRA. Therefore, the Missouri definition of hazardous waste is equivalent to the federal definition of the same term.

B. Determining Hazardous Waste by Characteristics.

Sections 260.360(9) and 260.370.3(1)(a) provide the Missouri Hazardous Waste Management Commission with specific authority to adopt regulations setting forth criteria for determining whether any waste or combination of wastes is hazardous. The latter subparagraph requires that such criteria take into account "toxicity, persistence and degradability in nature, potential for accumulation in tissue, and other related factors such as flammability, corrosiveness and other hazardous characteristics." Section 260.370.3(1)(a). These standards are identical to the standards set forth in § 3001(a) of RCRA, which authorizes EPA to establish criteria for the same purpose under the federal program.

Pursuant to § 260.370.3(1)(a), the Commission has adopted regulations setting forth criteria for determining whether a waste is hazardous. Sections (2), (3), (4) and (5) of regulation 10 CSR 25-4.010 set forth characteristics for ignitable, corrosive, reactive and toxic wastes, and establish testing and measurement standards to determine whether a waste possesses one or more of these characteristics, and is therefore hazardous. 10 CSR 25-4.010(2)-(5) are derived from 40 CFR 261.21 (ignitability), 261.22 (corrositivity), 261.23 (reactivity), and 261.24 (EP toxicity), and are substantially identical to the federal regulations. In addition, as in 40 CFR 261.10, section (1) of 10 CSR 25-4.010 places the primary responsibility upon generators to assess their waste in accordance with the identified characteristics and test and measurement methods. And as with 40 CFR 261.21 to 261.24, 10 CSR 25-4.010(2)-(5) assigns EPA hazardous waste numbers to wastes meeting these specified characteristics but not found on a hazardous waste list. Missouri's system of identifying hazardous waste by characteristics is substantially identical to that of the federal program.

C. Determining Hazardous Waste by Reference to Published Lists

Section 260.370.3(1)(a), in addition to authorizing the Commission to adopt regulations setting criteria or characteristics for determining if a waste is hazardous, specifically authorizes the adoption of lists of hazardous wastes, by regulation. The Commission has adopted such lists in 10 CSR 25-4.010(6). Under 10 CSR 25-4.010(1)(B), a person who generates waste found in one of the lists is deemed to be a generator of hazardous waste, unless that person shows that his waste is not hazardous pursuant to the procedures in section (7) of the regulation. These procedures will be discussed later in this subpart.

The hazardous waste lists contained in 10 CSR 25-4.010(6) are as follows: subsections (G) "Hazardous waste from nonspecific sources", (H) "Hazardous waste from specific sources", (I) "Discarded Commercial Chemical Products, Off-Specification Species, Containers, and Spill Residues Thereof", (J) "Missouri supplemental hazardous waste from nonspecific sources", (K) "Missouri Supplemental Hazardous Waste from Specific Sources" and (L) "[Missouri] Discarded Commercial Chemical Products or Byproducts, Off-Specification Species, Containers, and Spill Residues Thereof". Subsections (G), (H), and (I) are identical to the EPA lists contained in 40 CFR 261.31, 261.32 and 261.33. Each waste is preceded by a hazardous waste number which corresponds to the EPA identification number.

Subsections (J), (K) and (L) of 10 CSR 25-4.010(6) contain lists of wastes which EPA originally proposed to list as hazardous, but which have not been so designated. However, the wastes

on the Missouri supplemental lists are regulated as hazardous under the Missouri program. The greater coverage of the Missouri hazardous waste lists is not a ground for denying authorization of the state program. 40 CFR 123.1(k).

As noted above, listing of a waste in one of the lists in 10 CSR 25-4.010(6) creates a presumption that the waste is hazardous. 10 CSR 25-4.010(1)(B) allows a generator to seek a determination that the waste produced at his facility is not hazardous, and therefore not subject to regulation under the state program (referred to as "delisting"). The standards and procedures for requesting delisting and determining whether delisting is appropriate are set forth in section (7) of 10 CSR 25-4.010. That section requires the generator to show to the satisfaction of the Director of the Department of Natural Resources that the waste produced at the particular facility does not possess any of the characteristics for which it was listed. The standards set forth in 10 CSR 25-4.010(7) for obtaining a delisting are the same as those found in 40 CFR 260.22.

D. Exclusions.

Section 260.355 sets forth in five subdivisions five categories of waste which are exempted from the regulatory program under the Missouri Hazardous Waste Management Law. Subdivision (1) exempts "[r]adioactive wastes regulated by laws of the federal government or of this state." Section 1004(27) of RCRA and 40 CFR 261.4(a)(4) exclude from coverage under the federal program "source, special nuclear or by-product materials as defined by the Atomic Energy Act of 1954, as amended." Missouri does regulate radioactive materials under §§ 192.400 to 192.490, RSMo 1978, and rules adopted by the Division of Health in 13 CSR 50-90. However, EPA has not adopted rules subjecting to regulation under RCRA those radioactive wastes which are not regulated under the Atomic Energy Act. Therefore, the exemption in § 260.355(1) does not exclude from coverage any waste covered under the federal program.

Subdivision (2) of § 260.355 exempts "[e]missions to the air subject to regulation of and which are regulated by the Missouri air conservation commission pursuant to chapter 203, RSMo." We read this to be a narrow exemption, applying only to those waste constituents which are being emitted to the air, and which are actually subject to an emission limitation under Air Conservation Commission regulations. Whether this exclusion has any effect on the equivalency of Hazardous Waste Management Commission regulations with RCRA regulations depends on whether emissions to the air are regulated under RCRA regulations, and whether those emissions are regulated by the Air Conservation Commission.

To date EPA has chosen to regulate emissions of hazardous wastes to the air in two contexts. Part 264 and Part 265 regulations require that wind dispersal of particulate emissions from waste piles, landfills and land treatment facilities be "controlled." These are what are commonly known as fugitive dust regulations. Subpart O of Part 264 places emission limitations on incinerators for principal organic hazardous constituents (POHCs), hydrogen chloride, and particulate matter (§ 264.343), carbon monoxide (§ 264.345(b)(1)), and fugitive emissions from the combustion zone (§ 264.345(d)).

The present Air Conservation Commission regulations address some of the air emissions regulated under the federal program. Fugitive dust is regulated under 10 CSR 10-2.050, 10 CSR 10-3.070, 10 CSR 10-4.050, and 10 CSR 10-5.100. Particulate emissions from incinerators are regulated under 10 CSR 10-2.090, 10 CSR 10-3.040, 10 CSR 10-4.080, and 10 CSR 10-5.080. No Air Conservation Commission regulations apply to POHCs, hydrogen chloride or carbon monoxide emissions from incinerators, or to fugitive emissions from incinerator combustion chambers.

So that the Hazardous Waste Management Commission may regulate particulate emissions from incinerators, the Air Conservation Commission is proposing to amend its incinerator regulations, to exclude hazardous waste incinerators from the particulate emission limitations contained in 10 CSR 10-2.090, 10 CSR 10-3.040, 10 CSR 10-4.080 and 10 CSR 10-5.080. The proposed changes were published in the January, 1983 Missouri Register, and are set forth in an appendix to the state's Application for Interim Authorization. A hearing on the proposed regulation changes is scheduled for February 23, 1983. We understand that the Department's plan is that the changes will be adopted by the Air Conservation Commission at its March 23, 1983 meeting, for publication in the May 2, 1983 Missouri Register. On that schedule the changes will become effective on May 12, 1983, pursuant to § 536.021.5(2), RSMO 1978. Once those changes to the Air Conservation Commission regulations are in effect, § 260.355(2) will present no impediment to enforcement of Hazardous Waste Management Commission regulations respecting particulate emissions from incinerators.

Respecting fugitive emissions from waste piles, landfills and land treatment units, the Department has chosen for the present to regulate those emissions under the existing Air Conservation Commission fugitive dust regulations. Those regulations, found in an appendix to the Application for Interim Authorization, in general place three types of limitations on emissions of fugitive dust. First, they prohibit source operators from allowing particulate matter to become airborne in

such quantities that it is visible in the air beyond the boundaries of the premises where it originates, or allowing particles greater than 40 microns in size to go beyond the premises boundaries. Second, the regulations prohibit persons from constructing or using buildings and appurtenances, roadways and open areas without applying all reasonable measures required to prevent particulate matter from remaining visible or being found beyond the premises where it originates. Third, ambient air concentration limitations are established for inhabited places.

The federal regulations on the subject are not as specific. 40 CFR 265.251, applicable to waste piles, requires piles to be "covered or otherwise managed so that wind dispersal is controlled." 40 CFR 265.272(e), applicable to land treatment units, requires the operators to "manage the unit to control wind dispersal." 40 CFR 265.302(d), applicable to landfills, contains language identical to 40 CFR 265.251. The federal regulations do not say whether "control" means to prevent, or to lessen to some degree. No objective standard is provided. For that reason, we must conclude that the Air Conservation Commission regulations, which do provide objective criteria or limitations, are not just substantially equivalent to the federal provisions, but indeed provide greater protection to human health and the environment. No comparison to the fugitive dust regulations in Part 264 of the federal regulations is necessary, as the state is not at this time applying for authorization to issue RCRA permits for waste piles, landfills and land treatment units.

Subdivision (3) of § 260.355 excludes "[d]ischarges to the waters of this state pursuant to a permit issued by the Missouri clean water commission pursuant to chapter 204, RSMo." We interpret this exclusion to be limited to the discharge from a facility itself, and not to apply to the activities and processes which take place at the facility prior to the actual discharge. The federal program takes the same approach with regard to industrial wastewater facilities. 40 CFR 261.4(a)(2). Further, § 260.395.13(2) provides that permits are not required for municipal wastewater treatment plants which are permitted by the Clean Water Commission. Section 260.395.13 goes on to provide that the treatment plants must comply with § 260.390(3)-(7), pertaining to manifest, record keeping and reporting requirements.

The Hazardous Waste Management Commission has clarified these exclusions in 10 CSR 25-7.011(1)(B). That subsection provides for an exclusion from permitting for two categories of sources: (1) publicly owned treatment works (POTWs), so long as the facility possesses an operating permit pursuant to § 204.051, RSMo 1978, and is in compliance with that permit, all federal, state, and local pretreatment requirements are met, and the operator obtains a department identification number and complies with specified manifest, record keeping and reporting requirements; and (2) elementary neutralization units and wastewater

treatment units, if the operator complies with the standards of proposed 40 CFR Part 266, Subpart B, as published in the November 17, 1980 Federal Register. The latter exclusion is subject to revocation, and permitting may be required, if certain specified conditions exist. The corresponding exclusions in the federal program are found in 40 CFR 261.4(a)(1), 264.1(e) and (a)(6), 265.1(c)(3) and (c)(10), and 122.26(c).

40 CFR 261.4(a)(1) excludes from the definition of solid waste any domestic sewage, and any mixture of domestic sewage and other wastes, coming to a POTW via sewers. Thus, under the federal program hazardous waste can be introduced into public sewers without coming under RCRA regulation. It appears that implicit in 40 CFR 261.4(a)(1) is the assumption that those wastes will be subject to pretreatment requirements under Section 307(b) of the federal Clean Water Act. Compliance with pretreatment requirements is expressly required in 10 CSR 25.7.011 (1)(B)1. Thus, as to wastes introduced into public sewers, 10 CSR 25-7.011(1)(B)1 is consistent with 40 CFR 261.4(a)(1).

As to wastes delivered to a POTW by means other than sewers, the federal program has only a limited application. POTWs are wholly exempt from the Part 265 standards, 40 CFR 265.1(c)(3). 40 CFR 122.26(c) provides for a permit by rule for POTWs, as long as the owner or operator has an NPDES permit, is in compliance with the conditions of the NPDES permit, meets pretreatment standards, and complies with certain Part 264 requirements. 40 CFR 264.1(e) exempts POTWs from Part 264 standards, except as provided in the permit by rule provisions. Under 10 CSR 25-7.011(1)(B)1, POTWs receiving wastes by means other than sewers are treated in the same fashion. Pretreatment standards must be met. An identification number must be obtained. The manifest, reporting and record keeping requirements found in the state's equivalents to 40 CFR 264.71, 264.72, 264.73(a) and (b)(1), 264.75 and 264.76 must be met, as required by 40 CFR 122.26(c)(3). The facility must have and be in compliance with an operating permit issued pursuant to § 204.051, RSMo 1978. This is an NPDES permit, as Missouri has been delegated NPDES authority. 39 F.R. 40067 (November 13, 1974). Therefore, 10 CSR 25-7.011 (1)(B)1 is equivalent to 40 CFR 122.26(c) and 40 CFR 264.1(e).

As to waste managed at non-public wastewater treatment facilities and elementary neutralization units, the federal program is in a state of flux. By rulemaking published at 45 F.R. 76075 (November 17, 1980), EPA has wholly exempted such facilities from RCRA regulation. Thus, the state program is currently more stringent than the federal program in regard to such facilities, as 10 CSR 25-7.011(1)(B)2 requires compliance with the proposed Part 266 standards. We are cognizant of the fact that EPA in the November 17, 1980 Federal Register announced that those exemptions were intended to be temporary, and on the

same day proposed new regulations which, while not wholly exempting privately operated wastewater treatment facilities, would apply the less stringent Part 266 requirements to those facilities. We believe it unnecessary to compare the state regulations with the November 17, 1980 proposal, because the proposed federal regulations are clearly subject to change before promulgation. However, we note that, in addition to incorporating proposed Part 266 standards by reference, 10 CSR 25-7.011(1)(B)2 is substantially identical to the November 17, 1980 version of proposed 40 CFR 122.26(d).

Subdivision (4) of § 360.355 exempts "[f]luids injected or returned into subsurface formations in connection with oil or gas operations regulated by the Missouri oil and gas council pursuant to chapter 259, RSMo." The corresponding federal exclusion is found in 40 CFR 261.4(b)(5), which exempts "drilling fluids, produced waters, and other wastes associated with the exploration, development, or production of crude oil, natural gas or geothermal energy." There is no mention in the Missouri statute or regulations of an exemption for geothermal energy. We are informed that "fluids injected or returned into subsurface formations" is factually synonymous with "drilling fluids, produced waters, and other wastes." Therefore, the exclusion in § 260.355(4) is equivalent to the federal exclusion in 40 CFR 261.4(b)(5).

Subdivision (5) of § 260.355 exempts "[m]ining wastes used in reclamation of mined lands pursuant to a permit issued by the Missouri land reclamation commission pursuant to chapter 444, RSMo." Regulated by the Land Reclamation Commission are the surface mining of coal, §§ 444.800 to 444.970, RSMo, barite and certain small coal operations, §§ 444.500 to 444.755, RSMo, and clay, limestone, sand and gravel, §§ 444.760 to 444.786, RSMo. The corresponding federal exclusion is found in 40 CFR 261.4(b)(6), which covers all wastes from the extraction, beneficiation and processing of ores and minerals (including coal). We read 40 CFR 261.4(b)(6) to include within its terms coal, barite, clay, sand and gravel, as well as other minerals and ores not regulated under Chapter 444, RSMo. Therefore, the exception in § 260.355(5) is actually narrower than the exclusion in 40 CFR 261.4(b)(6). We also note 40 CFR 261.4(b)(3), which excludes mining overburden returned to the mine site. We believe that the limitation of the scope of § 260.355(5) to those wastes used in the reclamation of mined land makes that subdivision factually identical to the federal exclusion, as any overburden returned to the mine site would be used in the reclamation of the mined land. Therefore, § 260.355(5) and 40 CFR 261.4(b)(3) are equivalent.

Section 260.380.2 exempts individual householders and farmers who generate only small quantities of hazardous waste, and any person the Commission determines generates only small quan-

tities of hazardous waste on an infrequent basis, from the duties otherwise imposed on generators. This exemption is subject to the proviso that those exempted "shall manage all hazardous wastes they may generate in a manner so as to not adversely affect the health of humans, or pose a threat to the environment, or create a public nuisance; . . ." Section 260.380.2(1). It should be initially noted that § 260.380.2 exempts only small quantities, not all waste generated by farmers, householders and others. It is within the power of the Commission, acting pursuant to § 260.370.3(1), to adopt regulations defining the scope of small quantity exemption. Therefore, § 260.380.2 provides only a limited exemption.

As to farmers generating small quantities of waste, the state and federal exclusions are identical. The Commission has adopted in 10 CSR 25-5.010(11) the same exclusion as is found in 40 CFR 262.51, with respect to the disposal of waste pesticides from a farmer's own use. The exemption in 10 CSR 25-4.010(6)(E)4, relating to the waste generated from the growing and harvesting of crops, or from raising farm animals, and returned to the soil as fertilizer, is identical to the exclusion in 40 CFR 261.4(b)(2). As to any other hazardous waste that a farmer might generate, he would be subject to the same regulation as any other generator, with the same small quantity exemptions available to the farmer as are available to any other generator.

As to householders, EPA provides an exclusion in 40 CFR 261.4(b)(1). We read this paragraph to exclude all wastes generated from households, hotels and motels, regardless of quantity. Therefore, the exclusion in 40 CFR 261.4(b)(1) is potentially broader than the householders exemption in § 260.380.2. The state regulations do not contain an exemption specific to householders. Instead, householders are subject to the same small quantity exemptions as are other generators.

Pursuant to §§ 260.380.2 and 260.370.3(1), the Commission has adopted small quantity exemptions in 10 CSR 25-4.010(6)(D). We have carefully compared these regulations with 40 CFR 261.5, the federal small quantity exclusion, and find the two to be substantially equivalent. 10 CSR 25-4.010(6)(D)1 provides a small quantity exemption for generators of less than 100 kilograms of hazardous waste in a calendar month. 40 CFR 261.5(a) provides the same exemption for those generating 1,000 kilograms of hazardous waste in any month. 10 CSR 25-4.010(6)(D)2 provides that the accumulation of greater than 100 kilograms of hazardous waste, even if the generator would be exempt under paragraph (D)1, subjects the waste to full regulation under the state program. This is consistent with 40 CFR 261.5(f), to the same effect with regard to the 1,000 kilogram federal exclusion.

10 CSR 25-4.010(6)(D)3 provides a different small quantity exemption for acutely hazardous wastes. It provides that if a person either generates in a calendar month or accumulates at any one time hazardous wastes in the quantities specified in subsections (6)(I) or (6)(L) of 10 CSR 25-4.010, those wastes will be subject to full regulation. This implies that generation in one calendar month or accumulation at any one time of quantities less than specified in (6)(I) or (6)(L) is subject to the special provisions of subsection (6)(D). Subsection (6)(L) has reference to the wastes which EPA has not listed as hazardous. Therefore, Missouri's small quantity exemption for the substances listed in (6)(L) is of no concern under the federal program.

Subsection (6)(I) has reference to "Discarded Commercial Chemical Products, Off-Specification Species, Containers, and Spill Residues Thereof", and is Missouri's counterpart to 40 CFR 261.33. Paragraph (6)(I)5 contains a list of substances identical to 40 CFR 261.33(e). Under the Missouri regulation, the small quantities which are subject to reduced management requirements are set forth in paragraphs (6)(I)1-4, whereas under the EPA regulation these quantities are set forth in 40 CFR 261.5(e). In either case, the same effect is achieved. Less than 1 kilogram of a listed commercial product or manufacturing chemical intermediate ((6)(I)1), or less than 1 kilogram of an off-specification product or intermediate which would be listed if it met specifications ((6)(I)2), is subject to reduced management requirements, as is provided in 40 CFR 261.5(e)(1). Paragraph (6)(I)4, regarding 100 kilograms of residues or contaminated soil, water or debris, is identical in effect to 40 CFR 261.5(e)(2).

The only divergence between the state and federal regulations is in the treatment of some residues left in containers and inner liners. Under the federal program, the residues are regulated, but not the containers and inner liners themselves. 40 CFR 261.7 and 261.33(c). However, the state has chosen to regulate containers and inner liners in which hazardous wastes are found, as well as regulating the wastes themselves. 10 CSR 25-4.010 (6)(J), the Missouri supplemental list for non-specific sources, includes number MF13, "[a]ny container not meeting the definition of an empty container", and which has contained any listed substance or substance having hazardous characteristics. "Container" is defined in 10 CSR 25-3.010(1)(C)10 broadly, and would include an inner liner.

Under the federal program, an exclusion from regulation is provided with respect to residues remaining in a container or inner liner defined as empty. 40 CFR 261.7(a)(1), (b)(1) and (b)(2). The definition of empty, in relation to wastes other than the acutely hazardous category, is such that it amounts to a small quantity exemption. The state regulations achieve an identical effect. The state definition of empty, 10 CSR 25-

3.010(1)(E)2, is the same as 40 CFR 261.7(b)(1), except that the state definition does not include the alternative weight test adopted in the August 18, 1982 Federal Register. The lack of the alternative test does not render the state definition of empty inequivalent. The state definition does not specifically address containers which held compressed gas, as does 40 CFR 261.7(b)(2). However, the requirement in 40 CFR 261.7(b)(2) is implicit in the state definition of empty, as a compressed gas container from which no additional material can be removed by conventional emptying techniques would necessarily be approaching atmospheric pressure. Therefore, the state treatment of residues, other than residues of acutely hazardous wastes, is equivalent to the federal treatment of those residues.

As to residues of acutely hazardous wastes found in containers and inner liners, neither the state nor the federal regulations provide a small quantity exemption other than the one kilogram exemption found at 40 CFR 261.5(e)(1) and (f) and 10 CSR 25-4.010(6)(D)3. 40 CFR 261.7(b)(3) provides that a container or inner liner which held a substance on the acutely hazardous list is considered empty only if it has been triple rinsed or has undergone equivalent cleaning. However, this appears not to be a small quantity exemption, because the container or inner liner would be truly empty.

10 CSR 25-4.010(6)(I)3 also requires triple rinsing or equivalent cleaning for a container or inner liner which contained an acutely hazardous substance, but only if the container has more than a 20 liter capacity, or if more than 10 kilograms of inner liners are generated or accumulated. If the 20 liter/10 kilogram threshold is not exceeded, the container or inner liner is not considered a hazardous waste, and is not subject to regulation. However, any residues of acutely hazardous wastes remaining in the container or inner liner would still be regulated, subject to the one kilogram small quantity exemption. Thus 10 CSR 25-4.010(6)(I)3 does not provide a small quantity exemption, and is not at variance with the small quantity exemptions at 40 CFR 261.5.

Consistent with the small quantity exemptions under the federal program, small quantity exemptions under the state program do not remove the waste from regulation. Instead, the waste is subject to reduced management requirements. 10 CSR 25-4.010 (6)(D)4 provides that as to small quantities, the generator must treat the waste to render it non-hazardous, dispose of the waste on-site in a facility permitted under Section 260.205, RSMo 1978 (a sanitary landfill), or ensure delivery to an off-site facility permitted or certified under the Hazardous Waste Management Law or permitted by another regulatory agency (EPA or the destination state). Although not expressly stated, an on-site treatment facility would require a permit under 10 CSR 25-7.011(l)(A) unless

it is an exempted wastewater treatment facility or elementary neutralization unit, as 10 CSR 25-4.010(6)(D)4 does not specifically exclude such treatment facilities from the permitting requirements. Thus, any waste subject to the small quantity exemption must be treated, stored, and/or disposed of at facilities permitted or otherwise approved under the state program or the applicable state or federal program in another state, or in the case of on-site disposal, at a facility licensed to handle municipal or industrial solid waste, consistent with 40 CFR 261.5(g)(3).

In addition, the small quantity generator must, under 10 CSR 25-4.010(1)(A), determine if his waste is hazardous, consistent with 40 CFR 261.5(g)(1). Like 40 CFR 261.5(h), 10 CSR 25-4.010 (6)(D)5 provides that small quantities of waste, as specified in (6)(D), may be mixed with non-hazardous waste and remain subject to the reduced management requirements of (6)(D), unless the resultant mixture meets any of the characteristics of a hazardous waste. The provision of 40 CFR 261.5(i) appears to be implicit in the state regulation, as a hazardous waste that exceeds small quantity levels, but which is then mixed with a non-hazardous waste, would retain its identity as a hazardous waste, unless the mixture no longer meets any of the characteristics tests, and is delisted under 10 CSR 25-4.010(7).

The Commission has in 10 CSR 25-4.010(6)(E) adopted four other exemptions. Paragraph (E)1 exempts fly ash, bottom ash and scrubber sludge from fossil fuel-burning power plants, which is equivalent to the exclusion in 40 CFR 261.4(b)(4). Paragraph (E)2 exempts cement kiln dust, as does 40 CFR 261.4(b)(7). Paragraph (E)3 exempts lead mine tailings, which falls within the exclusion at 40 CFR 261.4(b)(7). And paragraph (E)5 exempts irrigation return flows, as does 40 CFR 261.4(a)(3). Other exclusions found at 40 CFR 261.4(b) have not been adopted by the state. To this extent, the coverage of the state program is broader than that of the federal program. In addition, 10 CSR 25-7.050(5)(A) provides an exemption from most storage and disposal requirements of the state regulations, for smelting slag and impoundment solids from the smelting industry. These wastes are wholly exempted from the federal program. 40 CFR 261.4(b)(7).

We find that the exclusions under the state statute and regulations are not substantially different than the exclusions under the federal program.

II. STANDARDS FOR GENERATORS OF HAZARDOUS WASTE
RCRA § 3002, 42 USC § 6922

A. State statutes and regulations provide coverage of all the generators of hazardous waste which is regulated under the state program. (See 40 CFR Part 262 and 123.128(b)(2)).

Citation of Laws and Regulations

Sections 260.360 and 260.380; 10 CSR 25-4.010 and 5.010

Explanation of Legal Authority

Section 260.360(8) defines a generator as "any person who produces waste." In Parts I. A. and D., supra, we discussed the definitions of "waste" and "hazardous waste" and the universe of hazardous waste covered by the state program, and found that the state program is consistent with the federal program in its coverage. Section 260.380.1 provides that after six months from the effective date of the regulations adopted by the Commission, hazardous waste generators must comply with ten enumerated requirements respecting the hazardous waste which they produce. With the exception of the limited small quantity exemptions discussed in Part I.D., supra, and found to be consistent with the exclusions under the federal program, § 260.380.1 applies to all generators of all hazardous waste which is regulated under the Missouri Hazardous Waste Management Law.

The Commission has in 10 CSR 25-5.010 adopted regulations concerning the duties of generators. Subsection (1)(A) of that regulation provides that all persons who generate in any one month or dispose of at one time the quantities of hazardous waste specified in 10 CSR 25-4.010 must register. The registration process is the state's equivalent to the federal program process of notification by generators under § 3010 of RCRA, and of obtaining a generator identification number under 40 CFR 262.12. The quantities referred to in 10 CSR 25-5.010(1)(A) as being specified in 10 CSR 25-4.010 are the small quantity exemption ceilings. Thus, those who generate in any one month more than the small quantity exemption level must register. This is consistent with 40 CFR 261.5(b).

10 CSR 25-5.010(1)(A) says nothing about the accumulation of hazardous wastes, instead requiring registration by generators who at one time dispose of wastes in quantities as specified in 10 CSR 25-4.010. Thus, one who comes within the small quantity exemption in terms of his monthly generation, but accumulates (without disposal) more than the small quantity accumulation ceilings in 10 CSR 25-4.010(6(D), is not required to register.

However, it appears to us that a non-registered generator would still be required to comply with all of the other requirements of 10 CSR 25-5.010, such as labeling and record keeping, and manifesting when the wastes are transported off-site, as sections (4) through (10) of the rule apply to all generators, seemingly without regard to the registration requirement. We cannot say whether EPA will view the failure to require registration by some generators, while all generators must meet the substantive standards contained in 10 CSR 25-5.010, as a substantial gap in the coverage of generators under the state program.

With the exception of the gap in the registration requirement for accumulators of hazardous waste, noted above, the state regulations provide coverage of all the generators of hazardous waste which is regulated under the state program.

- B. State statutes and regulations require all generators of waste to determine whether their waste is hazardous.
(See 40 CFR 262.11).

Citation of Laws and Regulations

Section 260.380.1; 10 CSR 25-4.010

Explanation of Legal Authority

Section 260.380.1(8) requires, *inter alia*, generators to perform such monitoring and analyses as specified by Commission regulations. The Commission has adopted in 10 CSR 25-4.010(1) a requirement that all generators of waste who know or have reason to believe that their waste is hazardous must evaluate their waste in accordance with the characteristics tests set forth in sections (2)-(5) of the regulation, unless the generator's waste is listed, or unless the generator elects to declare his waste hazardous without testing. Therefore, 10 CSR 25-4.010(1), like 40 CFR 262.11, requires the generator to determine whether his waste is hazardous. However, because of the "who know or have reason to believe" clause in 10 CSR 25-4.010(1)(A), we cannot say that the regulation requires all generators to determine whether their waste is hazardous, as does 40 CFR 262.11.

- C. State statutes and regulations require all generators covered by the state program to comply with reporting and record keeping requirements substantially equivalent to those found in 40 CFR 262.40 and 262.41. (See 40 CFR 262.40 and 123.128(b)(3)).

Citation of Laws and Regulations

Sections 260.370 and 260.380; 10 CSR 25-5.010

Explanation of Legal Authority

As previously noted, § 260.380.1(1) expressly requires generators to file reports providing information on hazardous waste generation. In addition, § 260.380.1(6) requires generators to initiate a manifest with each shipment of hazardous waste, and complete and file the manifest with the Department in accordance with Commission regulations. Section 260.370.3(1)(g) authorizes the Commission to adopt regulations establishing procedures and requirements for reporting the generation and transportation of wastes. And § 260.380.1(8) requires generators to maintain records as specified by Commission regulations.

Regulation 10 CSR 25-5.010(5)(A) requires generators to keep for at least three years the following: (1) a copy of, or the information from, each manifest; and (2) the registration information required by section (3) of the rule. The first category of records to be retained is not identical to 40 CFR 262.40(a), in that the federal regulation does not seem to allow the alternative of retaining the information from the manifests, without keeping the manifests themselves. The Commission believes that the availability of the information contained on the manifest would be substantially equivalent to having a copy of the manifest itself. The second category of information required to be kept under 10 CSR 25-5.010(5)(A), registration data, would include all tests, waste analyses and determinations made in the process of identifying the generator's wastes as hazardous. Thus, the second category of information is equivalent to 40 CFR 262.40(c).

40 CFR 262.41 requires an annual report from each generator, and 40 CFR 262.40(b) requires a copy of each annual report to be kept for at least three years. Neither of these is addressed in 10 CSR 25-5.010(5)(A). The Commission does not require an annual report from generators, instead requiring all manifests to be filed with the Department on a quarterly basis. 40 CSR 25-5.010 (4)(G). This provides the same information as the annual report required by 40 CFR 262.41(a), but on a more timely basis. As noted earlier, the state regulations require the generator to keep either a copy of the manifest, or the information from each manifest, for a period of three years.

An exception generator report is required by the state regulations when the generator does not receive the completed manifest from the treatment, storage or disposal facility within 30 days after shipment, as do the federal regulations. However, state regulations do not require a copy of those reports to be kept by the generator for three years, as does 40 CFR 262.40(b). While the exception generator reports may also be on file with the Department, we cannot say whether EPA would consider their availability in the Department's files to be substantially equivalent.

- D. For hazardous wastes that are accumulated by generators for short periods of time prior to shipment, state statutes and regulations require that such generators accumulate such wastes in a manner that does not present a hazard to human health or the environment. (See 40 CFR 262.34 and 123.128(b)(4)).

Citation of Laws and Regulations

Section 260.280; 10 CSR 25-5.010 and 7.050

Explanation of Legal Authority

All generators of hazardous waste in Missouri are required to containerize and label all hazardous waste, segregate all hazardous waste from non-hazardous waste, incompatible waste and materials, and other potential hazards, and provide safe storage and handling, including spill protection, from the time of generation to the time of removal from the generator's site, as specified in Commission regulations. Section 260.380.1(2), (3) and (4). These duties are without regard to the period of accumulation. Section 260.395.13 exempts from the requirement to obtain a facility permit the on-site storage of hazardous waste as exempted by the Commission by regulation, but such storage must conform to the requirements of RCRA and the state Hazardous Waste Management Law, along with the applicable standards and regulations adopted under the state statute, and any other applicable spill prevention and hazardous materials storage requirements provided by law.

The Commission has by regulation specified the requirements for on-site storage for short periods of time. 10 CSR 25-7.050(2)(A) provides that on-site storage for 90 days or less does not require a permit. However, the short-term storage must meet specified requirements concerning maintenance and inspection, 10 CSR 25-7.050(2)(A)1, handling of ignitable, reactive or incompatible wastes, 7.050(2)(A)2, and containerization and labeling, 7.050(2)(A)3. In addition, the requirements of 10 CSR 25-7.050(3) and (4), which set storage facility design standards and operating procedures for containers and tanks, are applicable to on-site storage for 90 days or less, as well as to those facilities requiring a permit.

The requirements for short-term on-site storage are addressed under the federal program in 40 CFR 262.34. 40 CFR 123.128(b)(4) does not refer to 40 CFR 262.34. Thus, it does not appear that the state must have provisions substantially equivalent in all respects to 40 CFR 262.34 in order to satisfy the requirements of 40 CFR 123.128(b)(4). Nevertheless, we have compared the provisions of the Missouri regulations applicable to short-term on-site storage of waste with 40 CFR 262.34. We believe that the state regulations are entirely consistent with 40 CFR 262.34.

As with 40 CFR 262.34(a), 10 CSR 25-7.050(2)(A) provides that on-site storage of hazardous wastes for not more than 90 days does not require a permit. 10 CSR 25-7.050(2)(B) states the converse, that on-site storage for more than 90 days requires a storage facility permit. On-site storage for 90 days or less is subject to certain conditions and requirements set out or cross-referenced in 10 CSR 25-7.050(2)(A). We will below compare the requirements set forth in 40 CFR 262.34 with those in the state regulation. Only where the language of the state regulation is not identical or substantially identical to the federal regulation will the provisions be discussed.

40 CFR 262.34(a)(1) requires that the stored wastes be placed in containers or tanks, and that the provisions of 40 CFR Part 265, Subpart I or J, be complied with, depending on whether a container or tank is used. This implies that surface impoundments and waste piles may not be used. 10 CSR 25-7.050(2)(A)6 requires compliance with the applicable provisions of sections (3) and (4) of the same rule, relating to containers and tanks. Thus, while it appears that the Commission anticipated that short-term storage would be accomplished in containers and tanks, there is no express requirement that only those types of vessels be used. However, 10 CSR 25-7.050(2)(A)3 does require that all short-term storage meet the containerization requirements of 10 CSR 25-5.010(6), which in turn references the U.S. Department of Transportation requirements at 49 CFR Parts 100 through 189. This requirement appears to effectively prohibit the use of surface impoundments and waste piles for short-term storage, as these latter facilities could not meet DOT requirements.

The requirements of 40 CFR Part 265, Subpart I, are found in the state regulations as follows: 265.171 is found at 10 CSR 25-7.050(3)(B); 265.172 is found at 7.050(3)(C); 265.173 is found at 7.050(3)(E); 265.174 is found at 7.011(3)(E)3.B(I); 265.176 is found in 7.050(3)(G); 265.177(a) is found in 7.050(3)(D)1; 265.177(b) is found in 7.050(3)(D)2; and 265.177(c) is found in 7.050(3)(D)3.

The requirements of 40 CFR Part 265, Subpart J, are found in the state regulations as follows. Section 265.192(a) is found in 10 CSR 25-7.050(4)(C)1 and 2 which together prohibit placing incompatible wastes and materials in a tank without complying with special requirements identical to 40 CFR 265.17(b). Section 265.192(b) is met by 10 CSR 25-7.050(4)(B), as the state requirement that storage tanks be made of or lined with a material compatible with the waste to be contained, and be free of leaks, cracks, holes or other deterioration, is equivalent to the federal requirement that wastes not be placed in a tank if they would cause the tank or liner to rupture, leak, corrode or otherwise fail.

Section 265.192(c) is addressed at 10 CSR 25-7.050(4)(A)2 and (4)(F)2. The federal requirement is that uncovered tanks be maintained with a minimum two feet of freeboard, or in the alternative, have a containment structure with a capacity of at least the volume represented by the top two feet of the tank. 10 CSR 25-7.050(4)(A)2 requires all above ground tanks to have a containment structure with a capacity equal to the largest tank, plus the capacity to hold a 25-year, 24-hour rainfall. This more than meets the alternative federal requirement. As to uncovered below ground tanks, 10 CSR 25-7.050(4)(F)2 requires that sufficient freeboard be maintained to prevent overtopping by wind or wave action, or by a 24-hour, 25-year storm. Neither a containment structure nor a specific minimum freeboard is required. However, as paragraph (4)(F)2 would ensure against overtopping due to wind and wave action, or due to a 25-year precipitation event, we believe that it provides an equivalent degree of protection as does specifying a two foot freeboard.

40 CFR 265.192(d) requires tanks into which there is a continuous feed of wastes to be equipped with a means to stop the inflow. 10 CSR 25-7.050(4)(F)1 provides that "controls and practices must be used to prevent overfilling." As the requirement of the federal regulation appears to be to prevent overfilling, we deem the state regulation to be equivalent in effect.

40 CFR 265.194 requires certain inspections of tanks. The state regulations are equivalent. 10 CSR 25-7.050(2)(A)1 incorporates by reference the inspection provisions of 10 CSR 25-7.011(3)(E)3. The requirements of 40 CFR 265.194 are addressed in the state regulations as follows: 265.194(a)(1) is found in 7.050(4)(G)1.A; 265.194(a)2 is found in 7.011(3)(E)3.A(I); 265.194(a)(3) is found at 7.050(4)(G)1.B; 265.194(a)(4) is found at 7.011(3)(E)3.B(I); and 265.194(a)(5) is found at 7.011(3)(E)3.B(II).

40 CFR 265.197 requires that at closure of a facility, all hazardous wastes and residues must be removed from tanks, discharge control equipment and discharge confinement structures. 10 CSR 25-7.050(2)(A)7 requires compliance with 10 CSR 25-7.011(9)(A)3 at closure of a short-term storage area. The latter regulation contains closure requirements identical in effect to 40 CFR 265.197.

40 CFR 265.198 and 265.199 set requirements for ignitable, reactive and incompatible wastes in tanks. The state regulations are equivalent. Section 265.198(a) is addressed at 10 CSR 25-7.050(4)(E)1 in an identical fashion, except that the alternative in 265.198(a)(1) is not found in the state regulation. This makes the state regulation, in effect, more stringent. Section 265.198(b) is found at 10 CSR 25-7.050(4)(E)2. And § 265.199 is found at 10 CSR 25-7.050(4)(C).

The state's equivalents to the remainder of 40 CFR 262.34 are as follows: 262.34(a)(2) is found at 10 CSR 25-7.050(2)(A)4; 262.34(a)(3) is found at 10 CSR 25-5.010(6)(D), incorporated by 10 CSR 25-7.050(2)(A)3; and 262.34(a)(4) is found in 10 CSR 25-7.050(2)(A)5. We note that 10 CSR 25-7.050 (2)(A)5 contains what is, in effect, an exemption for generators who store waste on-site for 90 days or less, from the responsibility to comply with the requirements cross-referenced in that paragraph. The exemption represents the federal small quantity exclusion levels. Under the federal program, the small quantity generator need not comply with 40 CFR 265.16 and Part 265, Subparts C and D, as to on-site storage. Therefore, the exemption levels in 10 CSR 25-7.050 (2)(A)5 are consistent with the federal program. Finally, provisions equivalent to 40 CFR 262.34(b) are found in 10 CSR 25-7.050(2)(B). Unlike the federal regulation, the state regulation makes no provision for an extension of the 90 day limitation for unpermitted on-site storage. This makes the state provision more stringent.

10 CSR 25-7.011(2)(B) makes reference to additional exceptions to the requirement to obtain a permit for on-site storage extending beyond 90 days. The exceptions found in 10 CSR 25-7.011(1), cross-referenced in 10 CSR 25-7.050(2)(B), have been discussed in Part I.D, *supra*. The exceptions in 10 CSR 25-7.050 (5), also cross-referenced in 10 CSR 25-7.050(2)(B), relating to special standards for on-site storage of certain wastes without the need to obtain a permit, are not inconsistent with the federal program. The first category of wastes, covered by 10 CSR 25-7.050 (5)(A), is smelting slag and impoundment solids from the smelting industry. These wastes are wholly exempted from the federal program. 40 CFR 261.4(b)(7).

A second category, found in 10 CSR 25-7.050(5)(B), are those wastes which cause the generator to register under the state program, but which are not subject to storage standards under the federal program. These would be the state supplemental list wastes which do not exhibit the characteristics specified in 10 CSR 25-4.010(2)-(5), and the wastes which are not acutely hazardous and are generated or accumulated in quantities less than the federal small quantity level of 1000 kilograms, but more than the state small quantity level of 100 kilograms. The supplemental list wastes which do not exhibit characteristics are simply not subject to the federal program, and the quantities less than the federal small quantities ceiling are not subject to storage standards under the federal program. See 40 CFR 261.5(f).

A third category of wastes, covered in 10 CSR 25-7.050(5)(C), are those wastes stored at resource recovery facilities, awaiting resource recovery operations. Under 10 CSR 25-7.050(5)(C), storage at these facilities does not require a permit, but the storage must be in compliance with 10 CSR 25-9.010(1)(D)3. The latter

regulation provides that the storage of wastes prior to resource recovery does not require a permit if, *inter alia*, EPA does not require interim status or a permit. Therefore, the state regulations provide an exemption from permitting of storage awaiting resource recovery no broader than the federal exemption at 40 CFR 261.6.

In conclusion, we believe that the state regulations regarding short-term on-site storage of wastes are fully equivalent to the federal regulations on the same subject.

- E. Respecting international shipments, state laws and regulations provide requirements which are substantially equivalent to those at 40 CFR 262.50, except that advance notification of international shipments, as required by 40 CFR 262.50(b)(1), shall be filed with the Administrator. (See 40 CFR 123.128(b)(5)).

Citation of Laws and Regulations

Section 260.370.3; 10 CSR 25-5.010(10)

Explanation of Legal Authority

Pursuant to its general rulemaking authority under § 260.370.3 (1), the Commission has adopted 10 CSR 25-5.010(10), which provides that any person importing hazardous waste into the United States or exporting hazardous waste to a foreign country must comply with 40 CFR 262.50. Thus, the state program is identical to the federal requirements respecting international shipments, including notification to the EPA Administrator.

- F. State statutes and regulations require that generators of hazardous waste who transport (or offer for transport) such hazardous waste off-site use a manifest system that ensures that interstate and intrastate shipments of hazardous waste are designated for delivery and, in the case of intrastate shipments, are delivered only to facilities that are authorized to operate under an approved state program or the federal program. (See 40 CFR 262.10(a)(10), 262.20 and 123.128 (b)(6)).

Citations of Laws and Regulations

Sections 260.370.3, 260.380.1, 260.385, 260.390, and 260.395.13; 10 CSR 25-5.010, 6.010, 6.020, 6.030, and 7.011.

Explanation of Legal Authority

Section 260.370.3(1)(g) specifically authorizes the Commission to adopt regulations establishing procedures and requirements for reporting the generation, storage, transportation, treatment, and disposal of hazardous waste. Section 260.380.1(6) requires hazardous waste generators to provide a separate manifest to the transporter for each load of waste transported from the generators' premises, and further requires generators to specify the destination of each load on the manifest. The manifest must be completed, signed and filed with the Department in the manner specified by regulation. Section 260.380.1(7) requires generators to utilize for treatment, resource recovery, disposal or storage of hazardous waste only facilities holding a permit under the state statute or a hazardous waste management act of the federal government or another state, or a resource recovery facility exempted from permitting under the state statute. Sections 260.395.13(3) and (4) provide that a facility permit is not required for a facility, or portion thereof, which the Department certifies is engaged solely in resource recovery, and not in the treatment or disposal of hazardous waste. Thus, resource recovery facilities are authorized by the state agency, even if no permit is issued. Section 260.380.2 exempts small quantity generators from the requirements of that section, provided the wastes are managed so as not to pose a threat to human health or the environment. Under its general rulemaking powers, the Commission can nevertheless specify the management techniques for these small quantities.

As to the transporter's role, Section 260.385(3) provides that the transporter shall accept shipments of waste only if accompanied by a manifest provided by the generator and completed and signed by the generator in accordance with Commission regulations. Section 260.385(4) requires the transporter to complete, sign and file the manifest in accordance with the regulations. Section 260.385(5) requires the transporter to deliver the waste and accompanying manifest only to the destination specified by the generator on the manifest, which destination must be one of the approved facilities listed in the preceding paragraph.

10 CSR 25-5.010(4) provides that for off-site shipments of waste, the generator must initiate the manifest on a form provided by the Department, or on a form meeting the federal program manifest requirements. The manifest must contain the information specified in subsection (4)(C), including the destination facility name, address, telephone number, and state and EPA identification numbers. Subsection (4)(F) provides that the generator must contract with the destination facility for the return of the completed manifest within 15 days of receipt. If the manifest is not returned within 30 days of shipment, the generator must file with the Department an exception generator report within 45 days

after shipment. The exception report contains certain information, including a description of the efforts by the generator to determine the whereabouts of the missing manifest and/or waste.

10 CSR 25-6.010(2)(B) requires a motor vehicle transporter to complete the transporter portion of the manifest by the driver signing and dating each copy received from the generator, keeping all but one of these copies (a copy is returned to the generator), obtaining a signature and date when delivering the waste to the designated facility or another transporter, and ensuring that the next transporter has a license. The transporter must have in his possession a manifest, or equivalent thereof, at all times. The "equivalent thereof" refers to 10 CSR 25-6.010(2)(B)1, which allows the transporter to accept unmanifested waste from a small quantity generator if the waste is transported to a permitted facility and the transporter maintains records substantially equivalent to the manifest information. 10 CSR 25-6.020(2)(B) requires rail transporters to follow special manifest procedures reflecting the unique shipping paper system of railroads in the United States. 10 CSR 25-6.030(2)(B), applicable to modes of shipment other than motor vehicle or rail, requires compliance with the manifest procedures of 10 CSR 25-6.010, or an alternative procedure using a shipping paper in place of the manifest.

10 CSR 25-7.011(6) requires operators of hazardous waste facilities to accept deliveries of waste only if the accompanying manifest or shipping paper meets the requirements of 10 CSR 25-5.010 and 10 CSR 25-6.010, 6.020 or 6.030. 10 CSR 25-7.011(6)(A) further requires the facility operator to complete, sign and date the manifest or shipping paper, give one copy to the transporter, and forward the original to the generator. The facility operator must also note any discrepancies and file discrepancy reports.

There are three exceptions to the duty to accept only waste accompanied by a proper manifest or shipping paper. First, 10 CSR 25-7.011(6)(A)3 allows unmanifested wastes to be accepted if directed to do so by the Department due to an emergency situation, provided that the generator files an unmanifested waste report as required in 10 CSR 25-7.011(6)(C)1.D. The direction from the Department would be pursuant to an emergency directive authorized by 10 CSR 25-7.011(2)(F), and is consistent with 40 CFR 122.27, 264.76 and 265.76. Second, 10 CSR 25-7.011(6)(A)4 allows facilities to accept unmanifested wastes from persons who are exempt from generator duties, provided that the type or identity of the waste, the quantity and origin of the waste, and the identity of the person delivering the waste are provided to the facility operator. This exception would apply to deliveries from small quantity generators and exempt farmers. The federal regulations allow the acceptance of unmanifested wastes from small quantity generators, without the provisos contained in 10 CSR 25-7.011

(6)(A)4. See 40 CFR 264.76 and 265.76. Third, 10 CSR 25-7.011 (6)(A)5 allows an exception like (6)(A)4, but applicable to deliveries in quantities greater than the small quantity exclusion, where the shipment was collected from more than one small quantity generator. This exclusion would also be consistent with 40 CFR 264.76 and 265.76.

Under the systems described above, hazardous waste shipped off-site or offered for shipment off-site by Missouri generators must incorporate a manifest system which is designed to ensure that wastes are destined for and delivered only to those facilities authorized under the state program, the federal program, or another state's program. As to shipments destined for a facility located in Missouri, the proscriptions applicable to transporters ensure that the waste will be delivered only to the designated approved facility.

G. The state manifest system requires that:

1. The manifest itself identify the generator, transporter, designated facility to which the hazardous waste will be transported, and the hazardous waste being transported. (See 40 CFR 260.10(a)(10), 262.21, 123.128(b)(7)(i))

Citation of Laws and Regulations

Section 260.380.1; 10 CSR 25-5.010

Explanation of Legal Authority

Section 260.380.1(6) requires that the generator must provide a separate manifest to the transporter for each load of waste transported off-site, that the generator specify the destination of the load on the manifest, and that the manifest be completed in the manner specified by Commission regulations. 10 CSR 25-5.010(4)(C) requires the generator to include on the manifest, inter alia, the generator's state and EPA identification numbers, generator's name, address and telephone number, transporter's name, address, telephone number, and EPA and state identification numbers, the destination facility's name, address, telephone number, and state and EPA identification numbers, DOT shipping name of the waste, the DOT hazard class for the waste, and the quantity, container type and number of units.

2. The manifest accompany all wastes offered for transport, except in the case of shipments by rail or water specified in 40 CFR 262.23(c) and (d) and 263.20(e) and (f). (See 40 CFR 128(b)(7)(ii)).

Citation of Laws and Regulations

Sections 260.380.1, 260.385; 10 CSR 25-5.010, 6.010, 6.020,
6.030

Explanation of Legal Authority

Section 260.380.1(6) requires a generator to provide a manifest to the transporter for each load of waste shipped off-site, except as provided otherwise by Commission regulations. Section 260.385(3) provides that except as allowed otherwise by regulation, the transporter shall accept wastes only if accompanied by a manifest. As to shipments by motor vehicle, 10 CSR 25-5.010 (4)(D) provides that the generator must keep one copy of the manifest, and give the remaining copies to the transporter. 10 CSR 25-6.010(2)(B)1 allows a transporter to accept wastes without a manifest only from persons not required to register under 10 CSR 25-5.010(1), that is, only from an excluded small quantity generator. Otherwise, 10 CSR 25-6.010(2)(B)2.C provides that those who transport waste into, out of, or through the state shall have in their possession a manifest, or equivalent thereof. Where the wastes pass from one transporter to another, the initial transporter must keep one copy of the manifest, and give all remaining copies to the next transporter. 10 CSR 25-6.010(2)(B)2.B(II). The state regulations are consistent with 40 CFR 262.23(a)(3) and (b) and 263.20(a), (c) and (d).

For shipments by rail, 10 CSR 25-5.010(4)(E) provides that the generator must send at least three copies of the manifest to the next non-rail transporter, or the designated facility, if transport is solely by rail, or to the last rail transporter to handle the waste in the United States, if being exported. 10 CSR 25-6.020(2)(B)2 provides that the rail transporter must keep a shipping paper containing all information from the manifest (except EPA identification numbers, generator certification, and signatures) with the waste at all times. 10 CSR 25-6.020(2)(B) also provides that when a rail transporter accepts wastes from a non-rail transporter, the rail transporter must sign and date the manifest and forward three copies to the next non-rail transporter, or to the designated facility, if the shipment is to be delivered to the facility by rail, or to the last rail transporter designated to handle the wastes in the United States. This is consistent with 40 CFR 262.23(d) and 263.20(f).

For shipments by a mode other than rail or motor vehicle, 10 CSR 25-5.010(4)(F) provides that the generator must send three copies of the manifest to the designated facility, or to the last other mode transporter to handle the waste in the United States, if the waste is to be exported. Copies of the manifest are not required for the other mode transporters. 10 CSR 25-6.030(2)(B) provides that the other mode transporter shall conform to the

manifest procedure set out in 10 CSR 25-6.010(2)(B), with an option of either the manifest accompanying the shipment, or the manifest being sent to the destination facility and a shipping paper accompanying the waste shipment. The shipping paper must include all information from the manifest, except EPA identification numbers, generator certification, and signatures. 10 CSR 25-5.010(4)(F) and 6.030(2)(B) are consistent with 40 CFR 262.23(c) and 263.20(e), except that the federal regulations refer to bulk shipment by water, rather than "other mode" transport. It appears that the special provisions of 10 CSR 25-5.010(4)(F) and 6.030(2)(B) would be applicable to all shipments not by motor vehicle or rail, not just bulk shipments by water. This would allow, for example, a shipment by airplane or by water but not in bulk to be made without an actual manifest accompanying the wastes. However, a shipping paper with all the information from the manifest, except the information noted in 10 CSR 25-6.030(2)(B)1, would accompany the wastes. Whether the broader application of these special provisions under the state regulations would be viewed as a substantial departure from the federal scheme, we cannot say. Otherwise, state regulations are consistent with federal regulations in requiring the manifest to accompany all waste shipments, except shipments by rail and bulk shipments by water.

3. Shipments of hazardous waste that are not delivered to a designated facility are either identified and reported by the generator to the state in which the shipment originated or are independently identified by the state in which the shipment originated. (See 40 CFR 260.10(a)(10), 262.42 and 123.128(b)(7)(iii)).

Citation to Laws and Regulations

Section 260.380.1; 10 CSR 25-5.010

Explanation of Legal Authority

Section 260.380.1(6) provides that the generator shall complete the manifest and file it with the Department in accordance with Commission regulations. Section 260.380.1(8) requires the generator to maintain records and submit reports as specified by Commission regulations on any waste generated, its transportation, and final disposition. 10 CSR 25-5.010(4)(G) requires the generator to contract with the destination facility to return the completed manifest within 15 days after receipt. If the generator has not received the manifest from the facility within 30 days of shipment, the generator must complete an exception generator report, and file same with the Department within 45 days of shipment.

10 CSR 25-5.010(4)(G) specifies the information which must be provided in the exception generator report. This includes all information necessary to enable the agency to trace the shipment, except that the regulation does not require the identity of the transporter to be reported. However, the present exception generator report, Form DNR HWG-12, requires identification of the transporter. (See Appendix VI.23 of the Application) Further, § 260.380.1(9) empowers the Department to at any time obtain from the generator any records relating to waste generation and management. If a particular exception generator report does not disclose the identity of the transporter, or any other information needed by the Department to trace the undelivered waste, the Department can obtain this information from the generator's records. Thus, the information needed to satisfy 40 CFR 123.128 (b)(7)(iii) is readily available to the Department. See also the Department's "Procedure for Manifest Exception Report Review and Investigation", found at Appendix VI.24 of the Application.

4. There is notification of undelivered interstate shipments to the state in which the facility designated on the manifest is located and to any state to which the shipment may have been delivered (or to EPA for unauthorized states). (See 40 CFR 260.10(a)(10), 262.42, and 123.128(b)(8)).

Citation of Laws and Regulations

None.

Explanation of Legal Authority

No provision of the Missouri statute or regulations requires the generator to notify another state in which the designated facility is located, or any state to which the waste may have been delivered, or EPA, in the case of an undelivered interstate shipment originating in Missouri. However, we understand that the Department has undertaken to provide such notifications, upon receipt of an exception generator report. We believe that this satisfies the requirement of 40 CFR 123.128 (b)(8).

III. STANDARDS FOR TRANSPORTERS OF HAZARDOUS WASTE RCRA § 3003, 42 USC § 6923

- A. State statutes and regulations provide coverage of all transporters of those hazardous wastes regulated under the state program. (See 40 CFR 263.10 and 123.128(c)(2)).

Citation of Laws and Regulations

Sections 260.360, 260.385, 260.390; 10 CSR 25-6.010, .020, and .030.

Explanation of Legal Authority

Sections 260.385(1) and 260.395.1 each provide that after six months from the effective date of Commission regulations, no persons may transport hazardous waste in Missouri without possessing a transporter license. The Commission regulations regarding transportation became effective January 1, 1980. "Person" is defined in § 260.360(13) to cover any legal entity. Regulations require license applications from motor vehicle operators, 10 CSR 25-6.010(1)(A), railroads, 10 CSR 25-6.020(1)(A), and all other mode haulers, 10 CSR 25-6.030(1)(A).

The statutes contain two exceptions to the above. Section 260.395.6 provides that a transporter license is not required for transport of wastes on the premises where they are generated, or with respect to those persons exempted in § 260.380. As discussed in Part I.D, supra, § 260.380.2 constitutes a small quantity exclusion for householders, farmers and others, consistent with 40 CFR 261.5, which we read as having the effect of exempting small quantity generators from the requirements of 40 CFR Part 263, if the generator transports his own waste. The exemption of on-site transporters from licensing is consistent with 40 CFR 263.10(b).

It should be noted that § 260.395.6 provides an exemption only from the need to obtain a license. That subsection specifically provides that exempted transporters are nevertheless subject to inspection by the Department, and further provides that the Department may require that the unlicensed equipment "be adequate to provide protection for the health of humans and the environment." Thus, substantive standards, such as the Missouri Public Service Commission and U.S. Department of Transportation standards referred to in 10 CSR 25-6.010(1)(C) and (2)(A), are still applicable (see also 10 CSR 25-6.020(2)(A) and 10 CSR 25-6.030(2)(A)).

With the above exceptions, the state statutes and regulations provide coverage of all transporters of hazardous waste. The exceptions are consistent with the exceptions contained in the federal program.

- B. State statutes and regulations require all transporters covered by the state program to comply with record keeping requirements substantially equivalent to those found at 40 CFR 263.22. (See 40 CFR 123.128(c)(3)).

Citation of Laws and Regulations

Section 260.385; 10 CSR 25-6.010, 6.020, and 6.030

Explanation of Legal Authority

Section 260.385(6) imposes upon hazardous waste transporters the duty to collect and maintain such records and submit such reports as are specified in the statute and in regulations and conditions of licenses adopted or issued thereunder. 10 CSR 25-6.010(2)(H) requires motor vehicle operators to file and maintain for a period of not less than three years all manifest copies signed by the generator, other transporters, and treatment, storage or disposal facility operators, and requires incident reports to be filed and maintained for the same period. 10 CSR 25-6.020(2)(E) requires railroads to file and maintain for a period of not less than three years copies of all hazardous waste manifests and shipping papers. 10 CSR 25-6.030(2)(E) requires other mode transporters to retain for three years all hazardous waste shipping information. And like 40 CFR 263.22(e), 10 CSR 25-6.010(2)(H)6, 6.020(2)(E)3, and 6.030(2)(E)2 provide that the three year period of retention of records is automatically extended during an unresolved enforcement action, or as requested by the department.

The record keeping requirements for transporters contained in the state regulations identified above are substantially equivalent to the federal regulations at 40 CFR 263.22. However, the state counterpart to 40 CFR 263.22(d) is not as broad in its coverage as the federal regulation. 40 CFR 263.22(d) requires specified record keeping for transporters who transport hazardous waste out of the United States. A substantially similar requirement is found in 10 CSR 25-6.010(2)(H)2, applicable to motor vehicle transport. A similar provision is not found in either 10 CSR 25-6.020 or 6.030. We cannot say whether the lack of such a provision in 6.020 or 6.030 presents a substantial inequivalency.

- C. State statutes and regulations require transporters of hazardous waste to use a manifest system that ensures that interstate and intrastate shipments of hazardous waste are delivered only to facilities that are authorized under an approved state program or federal program. (See 40 CFR 260.10(a)(10), 263.20 and 123.128(c)(4)).

Explanation of Legal Authority

See Part II. F., supra.

- D. State statutes and regulations require that transporters carry the manifest with all shipments except in the case of shipments by rail or water specified in 40 CFR 263.20(e) and (f). (See 40 CFR 123.128(c)(5)).

Explanation of Legal Authority

See Part II.G.2, supra.

- E. For hazardous wastes that are discharged in transit, state statutes and regulations require such transporters to notify appropriate state, local and federal agencies of the discharges and to clean up such wastes or to take action so that such wastes do not present a hazard to human health or the environment. Such requirements are substantially equivalent to those found at 40 CFR 263.30 and 263.31. (See 40 CFR 123.128(c)(f)).

Citation of Laws and Regulations

Section 260.370; 10 CSR 25-6.010, 6.020 and 6.030

Explanation of Legal Authority

Section 260.370.3(1) provides the general rulemaking power of the Commission to implement, enforce and effectuate the powers, duties and purposes of the state statute "as the commission may deem necessary to provide for the safe management of hazardous wastes to protect the health of humans and the environment." Further, § 260.370.3(1)(c) specifically authorizes the adoption of regulations for the transportation of hazardous wastes. And, § 260.370.3(1)(g) authorizes regulations to establish procedures and requirements for the reporting of transportation of hazardous wastes. Pursuant to these provisions, 10 CSR 25-6.010(2)(G) sets forth mandatory emergency procedures. 10 CSR 25-6.020(2)(D) and 6.030(2)(D) make these procedures applicable to rail and other mode transporters. These requirements are identical in substance to 40 CFR 263.30 and 263.31, except that no specific reference is made in the state regulation to the notification required by 33 CFR 153.203 in the case of water shipments. However, as notification is, in the order of priority set forth in 33 CFR 153.203(c), first to the National Response Center, as is specified in 10 CSR 25-6.010(2)(G)2.C, the same result is accomplished. Thus, the state regulations are substantially equivalent to 40 CFR 263.30 and 263.31.

IV. STANDARDS FOR TREATMENT, STORAGE AND DISPOSAL FACILITIES.
RCRA § 3004, 42 USC § 6924

State statutes and regulations provide standards applicable to treatment, storage and disposal facilities which are substantially equivalent to 40 CFR Part 265. State law prohibits the operation of facilities not in compliance with such standards in the following manner:

Citation of Laws and Regulations

Sections 260.390, 260.425.1; 10 CSR 25-7.011

Explanation of Legal Authority

Section 260.390(2) provides that after six months from the effective date of Commission regulations, facility owners and operators must operate their facilities in accordance with standards, rules and regulations adopted under the Hazardous Waste Management Law, and in accordance with permit terms and conditions. Facility regulations became effective on January 1, 1980. Section 260.425.1 provides that it is unlawful for any person to violate the Hazardous Waste Management Law or any standard, rule, regulation, order, or license or permit term or condition adopted or issued under the law. Section 260.425.1 goes on to provide for injunctive relief and penalties for any such violation. We read the cited statutes and regulations to prohibit the operation of a facility not in compliance with facility standards adopted in Commission regulations or imposed as permit terms or conditions.

The Commission has in 10 CSR 25-7.011(3)(A)1 provided as follows:

In addition to the standards in this rule, all hazardous waste facilities shall comply with the applicable standards set forth in 40 CFR Part 265 until such time as the facility receives a permit under the federal Resource Conservation and Recovery Act, P.L. 94-580, as amended.

We read this provision of the state regulations to require that until the state is granted authorization under RCRA to issue permits to a certain type of facility, and a facility actually receives its RCRA permit, it must meet all requirements in 40 CFR Part 265 applicable to that class of facility. This approach is consistent with the federal requirements at 40 CFR 265.1(b) and 40 CFR 123.128(e). It is unnecessary to specifically examine Part 265 regulations applicable to those types of facilities for which the state is not currently requesting Phase II interim

authorization. By adopting 40 CFR Part 265 by reference in 10 CSR 25-7.011(3)(A)1, the state program ensures that all facilities permitted by the state will meet Part 265 standards until the state receives either interim or final authorization.

V. INSPECTIONS

RCRA § 3007, 42 USC § 6927

- A. State law provides authority for officers engaged in compliance evaluation activities to enter any conveyance, vehicle, facility or premises subject to regulation, or in which records relevant to program operations are kept, in order to inspect, monitor, copy or otherwise investigate compliance with the state program, including compliance with permit terms and conditions and other program requirements.

Citation of Laws and Regulations

Sections 1.020, RSMo 1978; 260.375(9), 260.377, 260.380.1, 260.385, 260.390, 260.410.1.

Explanation of Legal Authority

Section 260.375(9) is the basic right of entry provision in the Missouri Hazardous Waste Management Law. It authorizes the Department's representatives to develop facts and make inspections and investigations, and in the connection therewith to "enter, at all reasonable times, in or upon any private or public property for any purpose required by sections 260.350 to 260.430 or any federal hazardous waste management act." The term "property" includes both real and personal property. Section 1.020(11), RSMo. 1978. Therefore, § 260.375(9) authorizes entry in or upon conveyances and vehicles, as well as facilities and premises.

Section 260.375(9) sets forth a number of purposes for which entry may be made. They include, without limitation: (1) developing and implementing standards, rules and regulations, orders, and license and permit terms and conditions; (2) inspecting or investigating any records required to be kept by the statute or any license or permit issued thereunder; (3) inspecting any hazardous waste management practice which is believed to violate the statute, or any standard, rule, regulation, order, license, or permit, or otherwise endangers human health or the environment; and (4) inspecting the site of any suspected violation.

Additional inspection provisions are found in other parts of the statute. Section 260.377 directs the Department to conduct inspections of all hazardous waste facilities, to determine compliance by the licensee or permittee with the statute, regu-

lations and permit conditions. Section 260.410.1 provides that the Department shall conduct investigations upon receipt of information concerning alleged violations, and may conduct other investigations it deems advisable to further the purposes of §§ 260.350 to 260.430. Section 260.380.1(9) directs generators to "allow the department to make unhampered inspections at any reasonable time of hazardous waste generation and management facilities located on the generator's property and hazardous waste generation and management practices carried out on the generator's property." Section 260.385(7) commands transporters to "allow the department to make unhampered inspections at any reasonable time of all facilities and equipment." Section 260.390(7) contains an identical command with regard to facility owners and operators.

The above provisions constitute a broad grant of authority to the Department to enter property, conduct inspections, take samples, and inspect and copy records relating to compliance with the state program, including license and permit terms and conditions. Section 260.375(9) further prohibits any person from refusing entry or access or obstructing or hampering an inspection, and provides for issuance of search warrants in aid thereof. The state statutes clearly provide the authority required by 40 CFR 123.128(g)(3), and are identical in effect to § 3007(a), RCRA.

VI. ENFORCEMENT REMEDIES
RCRA § 3006, 42 USC § 6926

State statutes provide the following:

- A. Authority to restrain immediately by order or by suit in state court any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment. (See 40 CFR 123.128 (f)(1)(i)).

Citation of Laws and Regulations

Sections 260.420.1, 260.425.1

Explanation of Legal Authority

The Missouri Hazardous Waste Management Law provides a variety of remedies to the Department of Natural Resources to restrain activity which is endangering public health or the environment. Section 260.420.1 provides two remedies in case of "imminent hazard", wherein the placing or escape of a hazardous waste may cause death, personal injury, acute or chronic disease, or serious environmental harm. Under such circumstances the Department or Commission may issue an order "directing the hazard-

ous waste generator, transporter, facility operator or any other person who is the custodian or has control of the waste . . . to eliminate such hazard." Section 260.420.1(1). Or, in the alternative, the Department or Commission may request the Attorney General or appropriate prosecuting attorney to file suit for temporary and permanent injunctive relief, including a temporary restraining order. Such action shall take precedence over all other matters in the circuit court. Section 260.420.1(2). In addition, Section 260.425.1 authorizes suit for injunctive relief to prevent any violation or imminent violation of the Hazardous Waste Management Law, or any regulation, order, license, or permit adopted or issued thereunder. Injunctive relief would include a temporary restraining order. Rule 92.02, VAMR. State law provides ample remedies to immediately restrain all unauthorized activities which are threatening public health or the environment.

- B. Authority to sue in courts of competent jurisdiction to enjoin violations of any program requirement. (See 40 CFR 123.128(f)(1)(ii)).

See Part VI.A, supra.

- C. Authority to assess or sue to recover in court civil penalties in at least the amount of \$1,000 per day for any program violation or to seek criminal fines in at least the amount of \$1,000 per day for any program violation. (See 40 CFR 123.128(f)(1)(iii)).

Citation of Laws and Regulations

Section 260.425

Explanation of Legal Authority

Section 260.425.1 authorizes civil suit, at the request of the Department or the Commission, to recover penalties of up to \$10,000 per day for violation of the statute, or any standard, rule or regulation adopted under the statute, or any order, license, permit or other determination issued under the statute. In addition, § 260.425.2 makes hazardous waste transportation practices in violation of the statute a Class A misdemeanor. Section 260.245.3 makes knowingly making a false statement, representation or certification in an application, record, report, manifest or other document filed or kept under the statute, or falsifying or tampering with a monitoring device or result therefrom a Class A misdemeanor, punishable by a \$5,000 fine and/or one year in jail. Section 260.245.4 imposes a criminal fine of \$2,500 to \$25,000 per day for knowingly treating, storing or disposing of

hazardous waste in violation of the statute. And § 260.425.5 makes it a Class A misdemeanor to own, operate or maintain a hazardous waste disposal facility in a manner which permits any acts or practices in violation of the statute. Except as provided otherwise in § 260.425.3, Class A misdemeanors are punishable by a \$1,000 fine (\$5,000 for a corporation). Sections 560.016 and 560.021, RSMo 1978. The Missouri Hazardous Waste Management Law contains ample provisions to satisfy the requirements of 40 CFR 123.128(f)(1)(iii).

VII. PUBLIC PARTICIPATION IN THE STATE ENFORCEMENT PROCESS
RCRA § 7004, 42 USC § 6974

- A. The state provides for public participation in the state enforcement process by providing intervention as of right in any civil action to obtain the remedies specified in Part VI above by any citizen having an interest which is or may be adversely affected. (See 40 CFR 123.128(f)(2)(i)).

Citation of Laws and Regulations

Rule 52.12(a), Missouri Rules of Civil Procedures (VAMR)

Explanation of Legal Authority

Rule 52.12(a), VAMR, sets forth the circumstances where a person is permitted to intervene in an action as a matter of right. Those circumstances are as follows: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 52.12(a) is the same as Rule 24(a) of the Federal Rules of Civil Procedure. Since the state's rule governing the right of intervention is identical to the federal rule, we believe that public participation in the enforcement process in Missouri meets the requirements of 40 CFR 123.128(f)(a)(i).

VIII. AUTHORITY TO SHARE INFORMATION WITH EPA
RCRA § 3007(b), 42 USC § 6927

- A. State statutes and regulations provide authority for any information contained or used in the administration of the state program, including information submitted to the state under a claim of confidentiality, to be available to EPA upon request without restriction. (See 40 CFR 123.132(a)).

Citation of Laws and Regulations

Section 260.430.1

Explanation of Legal Authority

Section 260.430.1 governs the disclosure or nondisclosure of information submitted to the Department or Commission under the statute. The general rule is that all information will be made available to the public. However, if the submitter requests in writing that the information be kept confidential, and makes an adequate demonstration that the information constitutes trade secrets, or that the information is entitled to confidential treatment in order to protect a secret plan, process, tool, mechanism or compound, or to protect a trade, business or manufacturing process, the information shall be kept confidential, unless nondisclosure would result in an unreasonable threat to human health or other living organisms. In such case, the information must be disclosed to the public, even if it constitutes legitimate confidential business information. If the Department director determines that the information should be disclosed, § 260.430.1 provides for notice to the submitter and an opportunity for the submitter to obtain administrative and judicial review, prior to actual disclosure.

We note that certain information submitted to EPA under the federal program is also subject to nondisclosure requirements. Section 3007, RCRA. EPA has promulgated regulations at 40 CFR Part 2 governing the handling of information submitted under claim of confidentiality. One of the categories of information which is subject to federal confidentiality requirements is confidential business information. 40 CFR 2.201. We read the federal regulations to provide protection for as broad a category of business information as is protected by § 260.430.1. See 40 CFR 2.201(e), 2.208(c), and 2.208(e)(1).

The regulations at 40 CFR Part 2 also contain mandatory procedures to be followed by EPA in determining whether business information is entitled to confidential treatment. Included is a requirement to give the business claiming confidentiality notice and the opportunity to seek judicial review of a determination of nonconfidentiality, prior to disclosure. 40 CFR 2.205(f). We believe that these procedures, if adhered to by EPA, will provide the same degree of protection to the business as is provided by § 260.430.1.

In light of the fact that federal regulations at 40 CFR Part 2 facially provide the same degree of protection for trade secrets and confidential business information as is provided by the state statute, we believe that § 260.430.1 does not prohibit the Department or Commission from sharing such information with EPA. So

long as EPA can protect the information to the same extent as the Department or Commission, assuming protection is warranted, we do not view EPA as being a part of the "public", as that term is used in § 260.430.1. Cf. Interco, Inc. v. FTC, 478 F.Supp. 103 (D.C. D.C. 1979). Under such circumstances, EPA would be entitled to information submitted to the Department or Commission under §§ 260.350 to 260.430, even if submitted to the Department under a claim of confidentiality. Of course all information not subject to confidentiality claims would be available to EPA, the same as any other person, without restriction.

Our opinion in regard to the above is premised exclusively on the protection facially afforded by 40 CFR Part 2 against improper disclosure of confidential information. We are aware that the Department and EPA have entered into a contract whereby EPA covenants to treat all information received from the Department, which was submitted to the Department under a claim of confidentiality, in accordance with 40 CFR Part 2. Should this agreement lapse, should EPA amend 40 CFR Part 2 to materially lessen the protections afforded thereunder, or should it appear that EPA is not following its own regulations or the agreement with the Department, we would have to reexamine our opinion.

IX. STATE PERMITTING REQUIREMENTS
RCRA § 3005, 42 USC § 6925

- A. State statutes and regulations prohibit the operation of facilities engaged in the storage of hazardous waste in containers, in the storage or treatment of hazardous waste in tanks, or in the treatment of hazardous waste by incineration, without a permit. The state allows the above named facilities which would qualify for interim status under the federal program to remain in operation pending permit action if they comply with the facility standards at 40 CFR Part 265. (See 40 CFR 123.129(b)).

Citation of Laws and Regulations

Sections 260.360, 260.390, 260.395.7; 10 CSR 25-7.011

Explanation of Legal Authority

Sections 260.390(1) and 260.395.7 both provide that after six months from the effective date of regulations, it is unlawful for a hazardous waste facility to be constructed, substantially altered or operated without a permit from the Department. Regulations governing facility permits became effective January 1, 1980 (10 CSR 25-7.010, now rescinded and replaced by 10 CSR 25-7.011). Therefore, the Missouri statutes have prohibited facility construction and operation without a permit since July 1,

1980. Section 260.360(10) defines a hazardous waste facility as "any property that is intended or used for hazardous waste management including, but not limited to, storage, treatment and disposal sites." This broad definition makes it clear that any storage or treatment facilities are subject to permitting, and that the prohibition on operation without a permit is applicable to all such facilities.

Regulation 10 CSR 25-7.011 sets forth general permitting requirements for all owners and operators of hazardous waste facilities which treat, store or dispose of such wastes, except as specifically exempted in section (1) of that rule (10 CSR 25-7.011(1)(A) and (2)(A)). The exemptions were discussed in Part I.D, supra, and found to be consistent with federal exclusions and exemptions.

As to treatment, storage and disposal facilities which qualify for interim status under federal regulations, 10 CSR 25-7.011(1)(D) provides that those facilities will be granted state interim status. As a condition of state interim status, such facilities must comply with all the applicable provisions of 40 CFR Part 265, in lieu of other provisions of 10 CSR 25-7, until the final administrative disposition of the facility permit application is made by the Department. 10 CSR 25-7.011(1)(D)4 and 5.

- B. State statutes and regulations require that facilities that would be deemed to have a federal permit by rule under 40 CFR 122.26 must obtain permits or are otherwise subject to fully enforceable state standards which are substantially equivalent to federal standards at 40 CFR 122.26. (See 40 CFR 123.129(f)).

Citation of Laws and Regulations

Sections 260.390, 260.395, 260.425.1; 10 CSR 25-7.011

Explanation of Legal Authority

40 CFR 122.26 provides for permits by rule for certain types of facilities, rather than EPA issuing individual permits to those facilities. The facilities presently covered by § 122.26 are publicly owned treatment works (POTWs), injection wells, and ocean disposal barges or vessels. The latter category is clearly inapplicable to Missouri. An injection well is defined as a well into which fluids are injected, 40 CFR 260.10. Section 577.155, RSMo Supp. 1982, prohibits the use of wells to dispose of liquid or semiaqueous waste. We deem § 577.155 and 40 CFR 260.10 to refer to the same types of materials when using the terms "liquid or semiaqueous" and "fluid". While injection wells associated with

oil and gas operations regulated by the Missouri Oil and Gas Council are excepted from the prohibition in § 577.155, those wastes are not regulated under RCRA. See 40 CFR 261.4(b)(5). Therefore, for the purposes of this memorandum only permits by rule for POTWs are relevant.

Missouri does not issue permits by rule. Rather, 10 CSR 25-7.011(1)(B) exempts POTWs from permitting, so long as the operator meets certain conditions. The conditions contained in 10 CSR 25-7.011(1)(B)1 are substantially identical to the conditions in 40 CFR 122.26(c). The exclusion of POTWs from permitting, while requiring those facilities to meet specified conditions, is consistent with § 260.395.13, which requires those facilities exempted from permitting to comply with § 260.390(3)-(7), the manifest, record keeping and reporting provisions for facility operators. The conditions imposed by 10 CSR 25-7.011(1)(B)1 are fully enforceable under § 260.425.1, as § 260.395.13 clearly exempts such facilities only from the procedural necessity to obtain a permit, and not from substantive standards.

In addition, 10 CSR 25-7.011(1)(B)2 grants to elementary neutralization units and wastewater treatment units the Commission's equivalent to a permit by rule, upon certain conditions. That paragraph requires the exempted facilities to meet the standards in 40 CFR Part 266, Subpart B, as published in the November 17, 1980 Federal Register. Because 40 CFR 122.21(d) (2)(vi), 264.1(g)(6) and 265.1(c)(10) presently wholly exempt such units from all federal program requirements, pending EPA's decision whether to adopt proposed 40 CFR Part 266, Subpart B, or similar regulations, the state regulations are presently broader in coverage than the federal regulations.

- C. State statutes and regulations which allow exemptions from state permitting requirements do not apply to persons other than those excluded by the federal program at 40 CFR 122.21(d)(2). (See 40 CFR 123.129(d) and 123.7).

Citation of Laws and Regulations

Sections 260.360, 260.390, 260.395.13; 10 CSR 25-7.011

Explanation of Legal Authority

Section 260.395.13 exempts three types of facilities from the procedural requirement to obtain a permit. They are: (1) on-site storage facilities exempted from permitting by Commission regulation, (2) POTWs possessing a permit from the Missouri Clean Water Commission, and (3) resource recovery facilities certified by the Department as engaged solely in resource recovery and not

treatment or disposal. All facilities exempted under § 260.395.13 are required to comply with the manifest, record keeping, and reporting requirements mentioned in § 260.390(3)-(7).

The Commission has expanded upon Section 260.395.13 in 10 CSR 25-7.011(1)(B) and (1)(C). Subsection (1)(B) exempts from permitting POTWs, elementary neutralization units, and wastewater treatment units, upon certain conditions. As discussed in Part IX.B supra, these exemptions are the Commission's version of permits by rule, and comply with 40 CFR 122.26(c) and proposed 40 CFR 122.26(d).

10 CSR 25-7.011(1)(C) contains another set of exemptions from the requirement to hold a permit. Paragraph 1 of that subsection exempts a licensed or permitted solid waste facility which accepts hazardous waste only from generators qualifying for the 100 kilogram small quantity exclusion. This permitting exemption is consistent with 40 CFR 122.21(d)(2)(iii). We note that the state exemption is actually narrower than its federal counterpart, by reason of the cross-reference in 10 CSR 25-7.011 (1)(C)1 to 10 CSR 25-4.010(6)(D)1, which has reference to the state's 100 kilogram per month small quantity exemption for wastes which are not acutely hazardous. The exemption from permitting contained in 10 CSR 25-7.011(1)(C)1 does not apply to the receipt of acutely hazardous wastes, even if offered by a person who qualifies as a small quantity generator of those wastes.

Paragraph 2 of 10 CSR 25-7.010(1)(C) exempts certified resource recovery facilities from permitting requirements, so long as those facilities are in compliance with 10 CSR 25-9.010. Likewise, 10 CSR 25-7.050(5)(C) exempts resource recovery facilities from the standards for storage facilities contained in that rule, if the conditions of 10 CSR 25-9.010(1)(D)3 are met. Rule 9.010 sets special requirements for resource recovery facilities, as defined in 10 CSR 25-9.010(1)(A). Subsection 9.010(1)(A) is so worded as to exclude from its coverage any facilities providing any treatment or disposal services. We read subsection 9.010 (1)(A) to have reference to the same types of activities as are covered under the term "beneficial use or reuse or legitimate recycling or reclamation," as used in 40 CFR 261.6, except that the federal regulation allows treatment prior to recycling, while 10 CSR 25-9.010(1)(A) does not allow facilities providing interim treatment to qualify for the special exemption from permitting. Paragraph (1)(D)3 of 10 CSR 25-9.010 further excludes from the coverage of the rule those storage facilities for which EPA requires interim status or a permit, thus requiring permitting of those facilities which are required under the federal regulations to attain interim status or obtain a permit. The state permitting exemption for resource recovery facilities does not apply to

facilities handling those categories of wastes mentioned in 40 CFR 261.6(b), making the state exemption consistent with the federal exemption.

Paragraphs 3, 4 and 5 of 10 CSR 25-7.011(1)(C) exempt from facility permitting those generators accumulating waste on-site in compliance with 10 CSR 25-7.050(2), which in Part II.D, supra, we found to be equivalent to 40 CFR 262.34, farmers disposing of waste pesticides in accordance with 10 CSR 25-5.010(11), which is identical to 40 CFR 262.51, and totally enclosed treatment facilities. The same exemptions are found in 40 CFR 122.21 (d)(2)(i), (ii) and (iv). No other exemptions from facility permitting exist under state statutes or regulations, other than those exclusions listed in § 260.355, discussed at Part I.D, supra. We found those exclusions to be consistent with the federal program.

- D. State statutes and regulations require that permits be effective for fixed terms no greater than 10 years. (See 40 CFR 123.129(e)).

Citation of Laws and Regulations

Section 260.395; 10 CSR 25-7.011

Explanation of Legal Authority

Section 260.395.12 provides that a hazardous waste facility permit shall be issued for a period up to five years. It may be renewed upon proper application by the permittee and after a determination by the Department that the applicant is in compliance with the Missouri Hazardous Waste Management Law and regulations, orders and permit terms and conditions adopted or issued thereunder. A renewal application is subject to full notice and public hearing requirements. Section 260.395.8. The statutory five year term for facility permits has been adopted in 10 CSR 25-7.011(2)(D)2. The same provision requires a new permit for continuation of activities beyond the expiration of the permit.

- E. State statutes and regulations require that all permits contain fully enforceable conditions that are substantially equivalent to those at 40 CFR 122.7, 122.11 and 122.28 (See 40 CFR 123.129(d) and 123.7).

Citation of Laws and Regulations

Sections 260.370.3, 260.395.9, 260.425.1; 10 CSR 25-7.011

Explanation of Legal Authority

Section 260.370.3(l)(d) empowers the Commission to adopt regulations setting the standards under which permits will be issued. In 10 CSR 25-7.011(2)(D), standard conditions of facility permits are set forth. Both § 260.395.9 and 10 CSR 25-7.011(2)(E) authorize the Department to place special conditions in permits. Permit conditions are fully enforceable under § 260.425.1, which provides for injunctive relief and civil penalties of up to \$10,000 per day of violation.

A comparison of 40 CFR 122.7, 122.11 and 122.28 to 10 CSR 25-7.011(2)(D) follows. 40 CFR 122.7 sets forth standard conditions applicable to all facility permits. The state regulations contain no requirement equivalent to the second and third sentences of the introductory paragraph of § 122.7, which require that all standard permit conditions either be set out in the permit, or a citation to the regulations containing those conditions be given in the permit. 10 CSR 25-7.011(2)(D)1 is identical to 40 CFR 122.7(a), except that the federal provision states that permit noncompliance "is" grounds for enforcement action, permit modification or revocation, or refusal to reissue a permit, while the state regulation provides that such non-compliance "may be" grounds for enforcement or permit actions. As such actions inherently involve the exercise of enforcement discretion by either EPA or the Department, use of the discretionary term in the state regulation does not make it inequivalent to the federal provision.

40 CFR 122.7(b) and 10 CSR 25-7.011(2)(D)2 are identical. Paragraph 7.011(2)(D)1, second sentence, is identical to 122.7(c), except the words "to state" have been added to the state provision. We do not believe that the additional words make the condition any less stringent, as it seems to be the Commission's intent to prohibit a permittee from defending in an enforcement action by claiming that compliance would have required reduced activities at the facility. However, to eliminate any doubt on this point, we recommend that the words "to state" be deleted before the Department applies for final authorization under RCRA.

Paragraphs 7.011(2)(D)3 and (D)9 are identical to 122.7(d) and (e), respectively. Paragraph 7.011(2)(D)4 is identical to 122.7(f), except that the word "stay" in the federal regulation was changed to "preclude" in the state regulation. We are sure that the Commission intended the meaning of the condition to be the same as the meaning of the federal condition. Paragraph 7.011(2)(D)5 is identical to 122.7(g), and paragraphs 7.011(2)(D)6 and 7 are equivalent to 122.7(h) and (i), respectively.

The requirement of 122.7(j)(1) is addressed in the first sentence of 7.011(2)(D)8.A. However, we are unable to say how the phrase "at least as specified in 10 CSR 25-7" affects the interpretation of this condition, if at all. Paragraphs 7.011 (2)(D)8.B and D are identical to 122.7(j)(2) and (3), respectively.

40 CFR 122.7(k) provides that all applications, reports, or information submitted to EPA must be signed and certified. That subsection contains a cryptic cross-reference to § 122.6, which we take to mean that the signatures and certifications must conform to the requirements of that section of the federal regulations. Paragraph 7.011(2)(D)10 of the state regulations contains a requirement that the permittee comply with the reporting requirements contained in subsection 7.011(6)(C), and a further requirement that the signatory requirements of paragraph 7.011 (2)(C)3 will apply to this reporting. Subparagraph 7.011 (2)(C)3.B requires all reports to be hand signed, and 7.011 (2)(C)3.C contains a certification identical to 122.6(d). Subparagraph 7.011(2)(C)3.C by its own terms applies only to permit applications, but we believe it clear that the Commission intended in 7.011(2)(D)10 to require the certification for all reports submitted under 7.011(6)(C).

Subsection 7.011(6)(C) contains all of the facility reporting requirements under the state regulations, except manifest discrepancy reports (7.011(6)(A)1), and the reports required after the trial burn process for incinerators. 10 CSR 25-7.020 (11)(B)(9) requires all trial burn submissions to comply with provisions at 10 CSR 25-7.011(2)(C)3 concerning signatures and certifications. Paragraph 7.011(6)(A)1 does not require manifest discrepancy reports to be certified, and it is unclear whether the term "reports required by permits" in 7.011(2)(C)3.B includes manifest discrepancy reports.

We find only one other type of submission covered by 40 CFR 122.7(k) which is not addressed in the state regulations -- applications by the permittee for permit modification. The current state regulations contain no procedural requirements for such applications.

40 CFR 122.7(l) sets a number of reporting requirements as conditions of the permit. 10 CSR 25-7.011(2)(D)10 requires reporting as specified in 7.011(6)(C). 40 CFR 122.7(l)(1) and (2) are addressed in an equivalent fashion in 7.011(6)(C)1.E and (6)(C)2.A, respectively. The state regulations contain no provision like 122.7(l)(3), because state facility permits are not transferrable. Paragraph 122.7(l)(4) is covered in 7.011(6)(C)1.A(VIII). There is no state equivalent to the compliance schedule provisions of 122.7(l)(5), as the state regulations make no allowance for compliance schedules.

The requirements of 122.7(1)(6) are addressed in equivalent fashion in 7.011(6)(C)2.B and C, except that the written incident report is required under the federal regulations to be submitted within 5 days of the incident, whereas the state regulation allows 15 days for the report to be submitted. However, we note that 40 CFR 122.28(d) allows EPA to extend the report due date to 15 days. 40 CFR 122.7(1)(7) requires all instances of non-compliance not reported under 122.7(1)(4), (5) or (6) to be reported at the time monitoring reports are submitted. 10 CSR 25-7.011(10)(D) requires all instances of noncompliance to be reported with the monitoring reports. While paragraph 7.011 (2)(D)10 is broader than its counterpart, it is not inequivalent, but instead may require submission of some reports twice, such as an incident report, which under 10 CSR 25-7.011(6)(C)2.C must be submitted within 15 days of the incident, and again with the monthly monitoring reports under 7.011(6)(C)1.A (VIII). 10 CSR 25-7.011(2)(H) contains a provision identical to 40 CFR 122.7(1)(8). However, 7.011(2)(H) is not identified as a permit condition.

40 CFR 122.11 does not specify standard conditions. Instead, it requires that all permits contain other requirements in the nature of special conditions, which we suppose must be developed on a case by case basis. The state regulation addresses these requirements in 10 CSR 25-7.011(2)(D), which sets standard conditions for all permits. The provisions of 40 CFR 122.11(a) are found in identical fashion in the last sentence of 7.011(2)(D)(9). We believe that the Commission intended to address the requirements of 122.11(b) in the second sentence of 7.011(2)(D)8.A. However, the sentence is incomplete, and addresses sampling, rather than monitoring as specified in the federal regulation. Thus, we are not sure that 7.011(2)(D)8.A covers all that is intended under the federal provision. There is no provision in the state regulations which requires the permit to specify all applicable reporting requirements, as does 122.11(c). However, we note that 10 CSR 25-7.011(2)(D)10 does provide, as a standard condition of the permit, that the permittee must comply with the reporting requirements specified in 7.011(6)(C). While we discern in the provisions of 10 CSR 25-7.011(2)(D) just mentioned an intent by the Commission to address the requirements of 40 CFR 122.11, we believe that they would better fit in 10 CSR 25-7.011(2)(E), which addresses special permit conditions.

40 CFR 122.28 sets forth additional standard conditions for facility permits. The state regulations contain no equivalent to 122.28(a). This provision excuses the permittee from compliance with permit conditions to the extent authorized in an emergency permit. As discussed later in this memorandum, the state does not issue emergency permits. Instead, 10 CSR 25-7.011(2)(F) authorizes the Department to issue emergency directives under circumstances which would warrant an emergency permit under the

federal program. We believe that the provision contained in 40 CFR 122.28(a) is implicit in 10 CSR 25-7.011(2)(F).

The requirement of 40 CFR 122.28(b) is found in 10 CSR 25-7.011(2)(D)8.C. Provisions substantially identical to 122.28(c) are found at 7.011(6)(C)1.E, and provisions substantially identical to 122.28(d) are found at 7.011(6)(C)2.B. These provisions are incorporated by reference in the reporting condition found in 7.011(2)(D)10. The requirement of 122.28(e)(1) is found in 7.011(6)(A)1. However, 7.011(6)(A)1 does not purport to be a permit condition itself. Nor does 7.011(2)(D) make reference to 7.011(6)(A)1. Therefore, although manifest discrepancy reports are required of facility operators, the state regulations do not require a permit condition respecting such reports. The provision of 122.28(e)(2) is found in 7.011(6)(C)1.D, incorporated by reference into 7.011(2)(D)10. A provision equivalent to 122.28(e)(3) is found in 7.011(6)(C)1.A, and is made a permit condition by incorporation by reference in 7.011(2)(D)10.

The state regulations specify as permit conditions most of the provisions of 40 CFR 122.7, 122.11 and 122.28. Whether the provisions which are lacking defeat substantial equivalency, we cannot say.

- F. Where state statutes and regulations authorize permit variances, permits are required to contain enforceable requirements that compliance be attained on fixed schedules and as soon as possible. Schedules of compliance are required where immediate compliance is not required. (See 40 CFR 123.129(d), 123.7 and 122.10).

Citation of Laws and Regulations

Sections 260.375, 260.390, 260.395.9, 260.405; 10 CSR 25-7.011

Explanation of Legal Authority

The general rule under the Missouri Hazardous Waste Management Law and implementing regulations is that a facility operator must be in compliance with all program requirements before an operating permit will be issued. Sections 260.375(12), 260.390(2) and 260.395.9; 10 CSR 25-7.011(2)(C)4.C. Further, it does not appear that the Department, in issuing a permit, can grant a waiver from facility requirements in the nature of a compliance schedule, as opposed to compliance at the time the permit is issued. *Id.* However, the Commission is authorized to grant individual variances from the requirements of the statute and regulations upon the showing specified in § 260.405.1. Presumably, this would include the authority to grant a variance

from specific facility requirements which are set forth in the statute or regulations.

There is no specific requirement in either the statute or regulations that any variance from permitting requirements contain a condition that compliance be attained on a fixed schedule, or as soon as possible. However, § 260.405.3 does provide that the variance cannot be issued for more than one year, and may not be renewed unless the applicant can show that circumstances precluded compliance within the one year period. In addition, the variance cannot be renewed if renewal will result in an unreasonable risk to human health or the environment. Because of the short period of any variance, and the further restrictions on renewal, we believe it is the clear legislative intent that full compliance, if excused at all, would be excused for the shortest period possible. In other words, if a variance is granted, we believe that § 260.405.3 implicitly requires compliance as soon as possible.

As to requiring compliance on a fixed schedule, § 260.405.3 specifically empowers the Commission to place terms and conditions on the variance. The ordering of a fixed schedule of compliance would appear to be within the scope of authority to fix the terms and conditions of a variance. However, in view of the short term allowed for a variance, it is of no practical significance that a fixed compliance schedule is not mandated by the statute. We believe that § 260.405.3 is properly read as requiring compliance within one year, or sooner if possible. If, during that year, circumstances arise which prevent compliance by the end of the variance period, a renewal may be granted, but only if no unreasonable health or environmental risks would result. Therefore, the statute itself fixes the compliance schedule at a maximum of one year, under normal circumstances. The Commission may fix the schedule at less than a year, by issuing the variance for a shorter period of time, but may not grant a compliance period of greater than one year. In our view, no further benefit would have been derived by specifying in the statute that compliance shall be required on a fixed schedule, as the statute provides the practical equivalent thereof.

- G. State statutes and regulations provide that where permits are transferred, the transferee must comply with all requirements of the permit. (See 40 CFR 123.7 and 122.14).

Citation of Laws and Regulations

Section 260.395.15

Explanation of Legal Authority

It is our view that under the Missouri Hazardous Waste Management Law, a permit may not be transferred. No mention is made in the statute of permit transfers. More importantly, § 260.395.15 provides that a permit may not be issued to any person who has habitually engaged in specified practices, or who has been adjudged in contempt of a court order enforcing solid or hazardous waste laws of Missouri, another state, or the federal government. Therefore, the identity and previous actions of an applicant for a permit, regarding compliance with solid and hazardous waste management laws, is always a relevant consideration in the permit issuance process. The concept of transfer of permits is not consistent with this inquiry, and a permit, once issued, is not transferable.

- H. State statutes and regulations authorize modification of permits where alterations are made to a facility or to activities at a facility or where new information is received. (See 40 CFR 123.129(d), 123.7, 122.15(a)(1) and (2)).

Citation of Laws and Regulations

Section 260.375; 10 CSR 25-7.011

Explanation of Legal Authority

The Department is given express authority in § 260.375(13) to modify permits. 10 CSR 25-7.011(2)(G) sets forth certain grounds for permit modification. Included as grounds for modification are alterations or additions to the facility, or new activities (7.011(2)(G)1.A), and new information (7.011(2)(G)1.C). These provisions are substantially identical to 40 CFR 122.15(a)(1) and (2).

- I. State statutes and regulations require that a facility operating in interim status amend its application where changes occur in: (i) the waste handled at the facility; (ii) processes and activities at the facility; (iii) facility ownership or operational control. (See 40 CFR 123.129(d), 123.7, 122.22(c)(iii) and 122.23(c)).

Citation of Laws and Regulations

10 CSR 25-7.011

Explanation of Legal Authority

Regulation 10 CSR 25-7.011(l)(D) provides for interim status for certain categories of facilities which have achieved interim status under RCRA. The facility operator must submit to the

Department the Part A application submitted to EPA, plus EPA's verification of interim status, as proof of federal interim status. If the facility operator submits the required proof, the facility is deemed to have state interim status. During state interim status, 10 CSR 25-7.011(1)(D)3 requires the facility to meet the applicable standards in 40 CFR Part 265, and 40 CFR 122.23, rather than the standards in 10 CSR 25-7. 40 CFR 122.23(c) requires Part A of the application to be amended upon the occurrence of any of the circumstances specified above. As 10 CSR 25-7.011(1)(D)3 incorporates by reference 40 CFR 122.23(c), the facility operating under state interim status must amend its application under the circumstances specified in 40 CFR 122.23(c).

- J. If the state allows the use of emergency permits, state statutes and regulations require standards for temporary emergency permits in situations of imminent and substantial endangerment to human health substantially equivalent to those at 40 CFR 122.27. (See 40 CFR 123.129(d) and 123.7).

Citation of Laws and Regulations

Section 260.375; 10 CSR 25-7.011

Explanation of Legal Authority

The Department has express authority to enter such orders as may be necessary in a situation of imminent hazard. Section 260.375(16). The Commission has in 10 CSR 25-7.011(2)(F) specified guidelines and limitations on the Department's use of orders to allow short-term facility operations which are not otherwise permitted. These orders are called emergency directives, rather than permits, in keeping with their function and status. The provisions of 10 CSR 25-7.011(2)(F) are substantially identical to 40 CFR 122.27(a), with one exception. Although the state regulation requires that the emergency directive be made known to the public through a legal notice, 10 CSR 25-7.011(2)(F).1.F, unlike 40 CFR 122.27(a)(5), does not specify what information shall be contained in the public notice. We are unable to say whether EPA will view this difference as affecting substantial equivalency.

X. STATE PERMITTING STANDARDS
RCRA § 3004, 42 USC § 6924

State statutes and regulations require that all permits issued by the state require compliance with standards substantially equivalent to federal standards at 40 CFR Part 264, Subparts A through E and G through J. These standards include:

Prefatory Note

The Department of Natural Resources has provided, at Appendix VIII of the Application for Interim Authorization, a detailed subsection by subsection comparison between the federal and state regulations. We have independently performed a detailed and careful comparison of the state regulations with 40 CFR Part 264, for equivalency. With the comparison already provided in Appendix VIII of the Application, it would serve no useful purpose to repeat the comparison here. Except as noted below, we find the present state regulations to be substantially identical to 40 CFR Part 264 requirements.

- A. Preparedness for and prevention of releases of hazardous waste controlled by the state and contingency plans and emergency procedures to be followed in the event of a release of such hazardous waste. (See 40 CFR Part 264, Subparts C and D).

Citation of Laws and Regulations

10 CSR 25-7.011(4) and (5)

Explanation of Legal Authority

Preparedness and prevention are addressed in the state regulations at 10 CSR 25-7.011(4). Only two differences exist between the state regulations and the federal provisions at 40 CFR Part 264, Subpart C. First, 40 CFR 264.31 speaks of unplanned sudden or non-sudden releases, whereas 10 CSR 25-7.011 (4)(B) addresses all releases. Thus, the coverage of the state regulation is potentially broader than that of its federal counterpart. Second, 40 CFR 264.37(a) requires the permittee to familiarize local hospitals with the properties of the wastes handled at the facility and health effects which could result from fires, explosions and other releases of wastes at the facility. 10 CSR 25-7.011(4)(G)1.D requires only one hospital to be so familiarized.

Contingency plans and emergency procedures are addressed at 10 CSR 25-7.011(5). There are few differences between those requirements and 40 CFR Part 264, Subpart D. In 10 CSR 25-7.011 (5)(B)1, the state regulation requires a plan to protect human health and the environment in the event of releases of waste, whereas 40 CFR 264.51(a) speaks of minimizing the threat to human health and the environment from unplanned sudden or non-sudden releases. The changes in terminology obviously do not affect the equivalency of these provisions. In 10 CSR 25-7.011(5)(E), (5)(G)2, and (5)(G)7, the state regulations require certain things be done promptly, whereas 40 CFR 264.54, 264.56(b) and 264.56(g) require those same things to be done immediately. We

are informed that the Commission believes that prompt action is substantially equivalent to immediate action. 40 CFR 264.55 requires that an emergency coordinator be at the facility or on call "at all times." 10 CSR 25-7.011(5)(F) limits this requirement to the period prior to closure of the facility. We believe that this is the intent of the federal requirement, and that the state provision is equivalent.

- B. Security to prevent unknowing and unauthorized access to the facility. (See 40 CFR 264.14).

Citation of Laws and Regulations

10 CSR 25-7.011(3)(D)

Explanation of Legal Authority

10 CSR 25-7.011(3)(D) requires facility operators to take measures to prevent unknowing and unauthorized access to the facility which are substantially identical to 40 CFR 264.14.

- C. Facility personnel training. (See 40 CFR 264.16)

Citation of Laws and Regulations

10 CSR 25-7.011(3)(F)

Explanation of Legal Authority

10 CSR 25-7.011(3)(F) requires a program of training of facility personnel substantially identical to 40 CFR 264.16.

- D. Compliance with the manifest system, including the requirement that the facility owner or operator or the state in which the facility is located must return a copy of the manifest to the generator or to the state in which the generator is located indicating delivery of the waste shipment. (See 40 CFR 264.71).

Citation of Laws and Regulations

10 CSR 25-7.011(6)

Explanation of Legal Authority

10 CSR 25-7.011(6)(A) contains the state's manifest requirements for facility operators. These requirements are substantially identical to the requirements of 40 CFR 264.71 and 264.72 with

two exceptions. First, 10 CSR 25-7.011(6)(A) requires the operator to return the original of the manifest to the generator within 15 days, rather than 30 days, as allowed by 40 CFR 264.71. Second, the state regulation requires the operator to submit a manifest discrepancy report promptly after the 15 day period for resolution of the discrepancy. 40 CFR 264.72 requires this report to be made immediately after the 15 day period. We see no lack of equivalency in this regard.

E. Closure and financial requirement. (See 40 CFR Part 264, Subparts G and H).

Citation of Laws and Regulations

10 CSR 25-7.011(8) and (9), 7.020, 7.050, 8.010

Explanation of Legal Authority

Closure and post-closure care requirements are addressed in 10 CSR 25-7.011(9). The closure requirements are substantially identical to 40 CFR 264.110-.115, with a few minor exceptions noted below. We are not at this time required to compare state regulations with 40 CFR 264.117-.120, regarding post-closure care, as those sections apply exclusively to facilities addressed under Phase II, Component C, of interim authorization. Missouri is not applying for Component C authorization at this time.

We note that in 10 CSR 25-7.011(9)(A)2, which is equivalent to 40 CFR 264.111, the word "by" was erroneously placed between "environment" and "the" in the fifth line of the paragraph. Although the presence of this word makes a literal reading of the provision somewhat difficult, the intent of the Commission is nevertheless clear. 40 CFR 264.112(a), second sentence, provides that the closure plan is to be submitted as part of the permit application, and is to be approved as part of the permit issuance process. 10 CSR 25-7.011(9)(B)1 also provides for submission of the closure plan with the permit application. Although the state regulation does not expressly require approval of the plan, it does provide that the plan will be a condition of the permit, and in the succeeding sentence refers to maintenance of the "approved" plan at the facility. We believe it clear that the plan will be approved by the Department as part of permit issuance.

The fourth sentence of 40 CFR 264.112(a), as well as the second sentence of 264.112(a)(1), are addressed in 10 CSR 25-7.011(9)(B)2.A, which requires the closure plan to address how and when the facility will be closed "in accordance with this section and closure requirements in other rules of this chapter." "Closure requirements in other rules" refers to those additional requirements in 10 CSR 25-7.020(8), equivalent to 40 CFR 264.351.

The requirements of 40 CFR 264.178 and 264.197, applicable to containers and tanks, are covered in 10 CSR 25-7.011(9)(A)3, rather than in 10 CSR 25-7.050.

We note that 10 CSR 25-7.011(9)(B)2.B, unlike 40 CFR 264.112 (a)(2), does not provide that a change in the estimate of the maximum inventory of wastes at the facility at any time during the life of the facility is treated as a minor modification. However, 10 CSR 25-8.010(2)(E) seems to allow to be treated as minor modifications those changes to the permit which would qualify as minor modifications under 40 CFR 122.17. Thus, the state provision is equivalent to 40 CFR 264.112(a)(2).

We note that the state regulations do not contain the parenthetical sentence in 40 CFR 264.112(a)(4). We believe that this sentence is unnecessary, as 10 CSR 25-7.011(9)(B)2.D does address the second sentence of 264.112(a)(4), which the sentence in parentheses simply modifies. The requirement of the first sentence of 264.112(a)(4), that the closure plan contain the expected year of closure, is addressed in 10 CSR 25-7.011(9)(B)2.A, which requires the plan to specify when the facility will be closed.

Financial requirements are addressed at 10 CSR 25-7.011(8). In that section the Commission has simply adopted by reference the provisions of 40 CFR Part 264, Subpart H, except 264.149 and 264.150, which are not applicable to the state programs. Thus, the state financial requirements are fully equivalent to the federal requirements.

F. Inspections, monitoring, recordkeeping, and reporting by facility personnel. (See 40 CFR 264.15 and Part 264, Subpart E).

Citation of Laws and Regulations

10 CSR 25-7.011, 7.020, 7.050

Explanation of Legal Authority

The Commission has adopted an approach to routine inspections somewhat different than that at 40 CFR 264.15. While 10 CSR 25-7.011(3)(E)2 requires inspections for malfunctions, deterioration, operator errors and discharges, as does 264.15(a), the state regulation does not require the facility operator to develop a written general inspection schedule. Instead, 10 CSR 25-7.011(3)(E)3 sets forth the types of inspections which must be made, and the minimum schedule for making the inspections. This eliminates the need for the operator to develop and the Department to approve a general inspection schedule.

As to those inspection items and frequencies specifically mentioned in the federal regulations referenced at 40 CFR 264.15 (b)(4), state regulations do require the same inspections, either in 10 CSR 25-7.011(3)(E)3, or in the case of certain inspections required under 40 CFR 264.194, in 10 CSR 25-7.050(4)(G). The inspections required under 40 CFR 264.347 are addressed in 10 CSR 25-7.020(7). We are not required at this time to address inspections required in 40 CFR 264.226, 264.253, 264.254, or 264.303, as those are Component C provisions. Daily inspection of areas subject to spills, as required by the third sentence of 264.15 (b)(4), is covered in 10 CSR 25-7.011(3)(E)3.A(II), by requiring daily inspections of all active portions of the facility for spills. 10 CSR 25-7.011(3)(E)4 is identical to 264.15(c), and 7.011(3)(E)5 is identical to 264.15(d), except that the 3 year record retention requirement is covered in the state regulations in 7.011(6)(B)8.

With the state program requiring the specific inspections required by the federal regulations and further specifically requiring other inspections which are covered by the federal program only in a general way, we believe that the state program provides for at least the same degree of environmental protection as does the federal program. Therefore, we believe that the state program provisions are substantially equivalent to the requirements of 40 CFR 264.15.

With regard to the record keeping and reporting provisions of 40 CFR Part 264, Subpart E, state regulations are either substantially identical or fully equivalent. The reader is referred to the detailed comparison of regulations in the Department's Application. It should be noted that the Commission requires a monthly report from facility operators, rather than the annual report specified in 40 CFR 264.75. The same information is required by 10 CSR 25-7.011(6)(C)1 as is required by 40 CFR 264.75.

G. Use and management of containers. (See 40 CFR Part 264, Subpart I.)

Citation of Laws and Regulations

10 CSR 25-7.011, 7.050(3)

Explanation of Legal Authority

Use and management of containers at hazardous waste facilities are covered in 10 CSR 25-7.050(3), with a few provisions required by the federal regulations being found in 10 CSR 25-7.011. The state regulations are equivalent to the provisions at 40 CFR Part 264, Subpart I. Two of the state provisions require some explanation. First, the provision in 40 CFR 264.174, regarding inspection

of areas where containers are stored, is covered by 10 CSR 25-7.011 (3)(E)3.B(I) and (II). Item 3.B(I) requires inspection of storage areas for leaks, rust and corrosion. We believe this to be equivalent to inspection under 40 CFR 2464.174 for leaking containers and deterioration of containers. Item 3.B(II) requires inspection of dikes and the immediately surrounding area for damage or structural weakening. We believe that compliance with item 3.B(II) would result in inspection of containment systems for signs of deterioration due to corrosion or other factors, as required by the federal provision.

Second, while 10 CSR 25-7.050(3)(F) meets the requirements of 40 CFR 264.195 respecting containment systems, we note that the state regulation is not worded as is 40 CFR 264.175(a). However, it is abundantly clear that 10 CSR 25-7.050(3)(F) does require the design and use of a containment structure meeting the same criteria as contained in 40 CFR 264.175(b). We also note that the state regulations do not contain the exceptions found in 40 CFR 264.175(b)(3) and (4), and 264.175(c). Thus, the state regulation may be slightly more stringent, which does not affect equivalency. The remaining state counterparts to 40 CFR Part 264, Subpart I, are so clearly equivalent as to not require an explanation.

H. Requirements for tanks. (See 40 CFR Part 264, Subpart J).

Citation of Laws and Regulations

10 CSR 25-7.011, 7.050

Explanation of Legal Authority

Use and management of tanks at hazardous waste facilities is addressed in 10 CSR 25-7.050(4), with a few requirements of the federal regulations being found in 10 CSR 25-7.011. The state regulations are equivalent to the provisions of 40 CFR Part 264, Subpart J. As in the case of the container regulations, some discussion of a few provisions of the state regulations is in order. First, the state regulations do not exempt covered underground tanks which cannot be entered for inspection, as does 40 CFR 264.190(b). Instead, the Commission requires of these facilities an alternate leak detection system. 10 CSR 25-7.050 (4)(A)3. Thus, the state regulations are in this regard more protective of human health and the environment.

Second, 40 CFR 264.194(a) and 10 CSR 25-7.050(4)(B) are worded rather differently. However, we believe that they are equivalent in effect. The state provision requires all storage tanks to be made of or lined with a material compatible with the waste to be contained, and further requires the tank and liner to

be free of leaks, cracks, holes or other deterioration. This appears to us to be the essence of the more elaborately worded federal provision.

Third, we note that in regard to restrictions on placing ignitable or reactive wastes in tanks, the state regulations do not allow the procedure specified in 40 CFR 264.198(a)(1). To this extent, the state regulations are more protective.

Fourth, 40 CFR 264.198(b) references Tables 2-1 through 2-6 of the National Fire Protection Association's "Flammable and Combustible Liquids Code." However, 10 CSR 25-7.050(4)(E)2 refers to Tables 2-1 through 2-8 of the same code. We are informed that Tables 2-7 and 2-8 pertain to spacing between adjacent above-ground tanks. Thus, inclusion of those tables in the state regulation should not affect equivalency.

Finally, 10 CSR 25-7.050(4)(A)3 allows the use of a leak detection system in conjunction with all underground tanks, as an alternative to the inspection procedures required in 40 CFR 264.194(b) and 10 CSR 25-7.050(4)(G)2. The leak detection system would be allowed for tanks which can be entered for inspection, although 40 CFR 264.194(b) does not seem to allow an exception from inspection procedures for such tanks. However, the Commission believes that leak detection systems are, in the case of underground tanks, more protective than visual inspections. If this is the case, then the state regulation must be viewed as substantially equivalent to 40 CFR 264.194(b).

I. Requirements for incinerators. (See 40 CFR Part 264, Subpart O, 40 CFR 122.25(b)(5), and 40 CFR 122.27(b))

Citation of Laws and Regulations

10 CSR 25-7.020

Explanation of Legal Authority

The Commission has adopted in 10 CSR 25-7.020 provisions respecting incinerators which are virtually identical to 40 CFR Part 264, Subpart O. We need mention only two matters. First, the partial exemption for incinerators burning only certain types of wastes, which is mandatory under 40 CFR 264.340(b), is discretionary with the Department under 10 CSR 25-7.020(1)(B). This difference may make the state regulations somewhat more stringent, which does not affect equivalency.

Second, in 10 CSR 25-7.020(6)(B), first paragraph, comparable to 40 CFR 264.345(b), a portion of the parenthetical phrase was unintentionally deleted. While this omission makes the paragraph

grammatically incomplete, we do not believe substantial equivalency should be affected. The function of this paragraph is to give direction to the permit writer in setting operating requirements for incinerators. The intention of the state regulation is sufficiently clear that there should be no inadequacy in the permit due to the omission of a portion of the parenthetical material contained in the federal regulation. Thus, 10 CSR 25-7.020(6)(B) is substantially equivalent to 40 CFR 254.345(b). The Commission is advised to correct this omission prior to applying for final authorization.

While general requirements for permit application information will be discussed later in this memorandum, we think it appropriate to discuss at this point some special requirements applicable to incinerator permit applications. These provisions are found at 40 CFR 122.25(b)(5). The Commission has adopted at 10 CSR 25-7.020(10) virtually identical provisions, with one exception. The state regulations do not contain a provision similar to 40 CFR 122.25(b)(5)(iii)(E)(3). This omission was made in reliance on a memorandum dated August 26, 1982 from David B. Sussman, of EPA, to EPA Regional Office hazardous waste branch chiefs, advising that EPA had not intended to include 40 CFR 122.25(b)(5)(iii)(E)(3) in the federal regulations, and that it would be deleted at a later date. In light of this memo, the absence of this provision in the state regulations cannot be considered a lack of equivalency.

The federal regulations also contain some special provisions applicable only to incinerators, which require the submission of trial burn plans and the conducting of trial burns, before a full permit can be issued. See 40 CFR 122.27(b). Virtually identical provisions are found at 10 CSR 25-7.020(11).

XI. STATE PERMITTING PROCEDURES RCRA § 3005, 42 USC § 6925

- A. State statutes and regulations require that all new facilities for the storage of hazardous waste in containers, for hazardous waste storage or treatment in tanks, or for treatment of hazardous waste by incineration, obtain a permit prior to beginning physical construction of the facility. For existing facilities, the state requires completion of the permit application process within a reasonable time. (See 40 CFR 123.129(d), 123.7, 122.22(a)(2) and (b)).

Citation of Laws and Regulations

Sections 260.390, 260.395.7; 10 CSR 25-7.011

Explanation of Legal Authority

Sections 260.390(1) and 260.395.7 provide that after six months from the effective date of regulations adopted by the Commission, it is unlawful for any person to construct, substantially alter or operate a hazardous waste facility without first obtaining a permit from the Department. Regulations governing permits, 10 CSR 25-7.010 (now superseded by 10 CSR 25-7.011), became effective on January 1, 1980. Therefore, the prohibitions of §§ 260.390(1) and 260.395.7 are now fully effective, and a new facility must obtain a permit prior to commencing construction (see also 10 CSR 25-7.011(2)(C)4.B). As for existing facilities, operators were given a period of six months after permitting regulations were adopted in which to make application and obtain a permit. The above statutes and regulations apply to all hazardous waste facilities, including the types of facilities described above, as was explained in Part IX.A supra.

- B. State statutes and regulations require that permit applications contain information that is substantially equivalent to information required at 40 CFR 122.4, 122.24 and 122.25. (See 40 CFR 123.129(d) and 123.7).

Citation of Laws and Regulations

Sections 260.370.3, 260.390, 260.395.7; 10 CSR 25-7.011

Explanation of Legal Authority

Section 260.370.3(l)(d) authorizes the Commission to adopt regulations setting forth standards for the issuance of permits. In addition, § 260.395.7(1) requires the facility permit applicant to furnish the Department with plans, specifications and other data necessary to demonstrate that the facility does or will provide protection to the health of humans and other living organisms, and does or will comply with the state statute and regulations and RCRA. Section 260.395.7(2)-(5) makes specific reference to certain information required in the permit application, including the demonstration of financial responsibility required by the regulations, and the environmental and geologic information, assessments and studies required by the regulations.

The Commission has in 10 CSR 25-7.011 specified the information which must be submitted with a facility permit application. 10 CSR 25-7.011 requires most of the information required by the federal regulations. We will note below those instances where it appears to us that the state regulations do not require an item of information required by the federal regulations. We will also discuss below those areas where a simple cross-reference between

state and federal regulations would not suffice because of differences in the phraseology used. Otherwise, the reader is referred to Appendix VIII of the Application for Interim Authorization, where a detailed comparison of state and federal regulations is provided.

10 CSR 25-7.011(2)(C)1 and 3 require the owner and operator (if different from the owner) to sign the permit application. In addition, § 260.390(1) makes it unlawful for either an owner or an operator to construct or operate a facility without a permit. We read the statute and regulations to provide for issuance of the permit to both the owner and the operator, as joint permittees. This system is equivalent to 40 CFR 122.4(b). 10 CSR 25-7.011 (2)(C), first paragraph, requires the application to be complete, and 7.011(2)(C)4.A provides that the director of the Department can issue a permit only when he determines that the application conforms to the requirements of the statutes and regulations. Conformance would include submitting all the information required by Commission regulations. Therefore, 10 CSR 25-7.011(2)(C)4.A does not allow the director to issue a permit until the application is complete, as required by 40 CFR 122.4(c).

The state regulations do not require the application to contain SIC codes for the facility, unlike 40 CFR 122.4(d)(4). 40 CFR 122.4(d)(5) is inapplicable to the Missouri program, as there are no Indian lands in Missouri. As § 577.155, RSMo Supp. 1982, prohibits the use of any hazardous waste injection well which is subject to regulation under the federal program (see Part IX.B, supra), the state regulations need not contain the requirement in 40 CFR 125.4(d)(7) that the map submitted with the application show the location of the facility's injection wells.

The requirement of 40 CFR 122.4(d)(8), that the application contain a brief description of the nature of the applicant's business, is met in the state regulations in two ways. First, if the application is for an off-site facility, the nature of the applicant's business will be evident from the information submitted pursuant to 10 CSR 25-7.011(2)(C)1, particularly the description of the activities requiring a facility permit, and the list of wastes to be handled. The nature of the business will be to conduct those activities and treat, store or dispose of those wastes listed. If the application is for an on-site facility, where the applicant may be engaged in some enterprise wherein hazardous wastes are incidentally generated, the registration information required by 10 CSR 25-5.010(3), as well as the information submitted pursuant to 10 CSR 25-7.011(2)(C)1, will produce the same results as 40 CFR 122.4(d)(8).

The only provision of 40 CFR 122.24 not contained in the state regulations is 122.24(c), which requires the application to indicate if the facility is new or existing, and whether the

application is a first or revised application. The Commission believes this provision is unnecessary, as its staff should be aware, on receipt of an application, if there is a previous application on file, or if it is a first application. In addition, the Commission feels that the photographs and scale drawings required by 10 CSR 25-7.011(2)(C)1.H and 1.I for an existing facility, or the absence thereof, will inform the staff whether the facility is proposed or existing.

In regard to the informational requirements of 40 CFR 122.25, a preliminary note is in order. The state regulations are to some degree organized along different lines than are the federal regulations, with regard to permit application information. Most of the information required by 40 CFR 122.25 is not specifically mentioned in 10 CSR 25-7.011(2), the general permit information section of the state regulations. Instead, some of that information is specifically required in later sections of Rule 7.011. In other cases, facility standards are set forth in Rule 7.011 or other rules in Chapter 7, with the last sentence of the first paragraph of 10 CSR 7.011(2)(C)2 requiring the permit applicant to address, as part of the application, how he will meet the applicable facility standards set forth in Chapter 7. Therefore, even if a later section or rule does not expressly require information to be submitted in the permit application, but a facility standard dealing with the subject is set forth, 10 CSR 25-7.011(2)(C)2 will necessarily require information to be submitted. The reader should keep this in mind when referring to the comparison between 40 CFR 122.25 and state regulations in Appendix VIII of the Application for Interim Authorization.

40 CFR 122.25(a)(2) requires that the application contain the chemical and physical analyses of the wastes to be handled at the facility. It is not clear to us that the state regulations contain this requirement. 10 CSR 25-7.011(3)(C)1 requires that a detailed waste analysis be obtained before the facility operator treats, stores or disposes of the waste. However, it does not appear that the requirement of 10 CSR 25-7.011(2)(C)2, mentioned above, would require that the waste analyses provided for in 10 CSR 25-7.011(3)(C)1 be obtained and submitted with the permit application. Rather, it would seem that 10 CSR 25-7.011 (2)(C)2 could be satisfied by simply describing how the waste analyses would be obtained prior to handling the wastes. Further, we are unsure whether the development of the list of wastes for the permit application, as required by 10 CSR 25-7.011(2)(C)1.C, would of necessity require an analysis of each waste.

10 CSR 25-7.011(5)(C)2 does appear to require that the waste analysis plan required under 10 CSR 25-7.011(3)(C)4, or something similar, be submitted with the application. Otherwise, the application would not satisfactorily address (per 10 CSR 25-7.011 (2)(C)2) how the applicant would meet the waste analysis require-

ments of 10 CSR 25-7.011(3)(C)1-3. Thus, the state regulations do appear to meet the requirement of 40 CFR 122.25(a)(3) that a copy of the waste analysis plan be submitted with the application.

40 CFR 122.25(a)(4) requires in the application a description of the security procedures and equipment required by the federal equivalent to 10 CSR 25-7.011(3)(D). We believe that 10 CSR 25-7.011(2)(C)2 may reasonably be interpreted to require as part of the state application a description of the procedures and equipment which will be employed to satisfy the requirements of 10 CSR 25-7.011(3)(D).

State regulations, unlike 40 CFR 122.25(a)(5), do not require a general inspection schedule to be submitted with the permit application. Instead, 10 CSR 25-7.011(3)(E)3 sets forth the specific inspections which must be made. Therefore, no general inspection schedule need be submitted. With regard to 40 CFR 122.25(a)(6), it should be noted that 10 CSR 25-7.011(4)(C), (4)(E)1, (4)(E)2, and (4)(F) require the permit applicant to demonstrate to the Department director's satisfaction the justification of any waivers from preparedness and prevention requirements. Therefore, the justifications will necessarily have to be submitted to the Department. We believe that 10 CSR 25-7.011(2)(C)2 will require the applicant to submit any justifications with the permit application, as part of the demonstration how we will meet the preparedness and prevention requirements of 10 CSR 25-7.011(4).

40 CFR 122.25(a)(7) requires a copy of the contingency plan to be submitted with the application. 10 CSR 25-7.011(2)(C), first paragraph, expressly requires the submission of a contingency plan as part of the application. The application requirements of 40 CFR 122.25(a)(8) are found in 10 CSR 25-7.011(2)(C)2.C. 40 CFR 122.25(a)(9) requires a description of precautions to prevent accidental ignition or reaction of ignitable, reactive or incompatible wastes as required to demonstrate compliance with the equivalent of 10 CSR 25-7.011(3)(G). We believe that 10 CSR 25-7.011(2)(C)2 may reasonably be read to require the same demonstration in the state application.

40 CFR 122.25(a)(10) requires the submission of information concerning specified aspects of the vehicular traffic and roads in and near the facility. 10 CSR 25-7.011(2)(C)2.A(II)(d) merely requires submission of "traffic patterns within the facility." We doubt the state regulation requires the same information as required under the federal provision.

40 CFR 122.25(a)(11)(i) is met by 10 CSR 25-7.011(2)(C)1.B, which requires the location of the facility to be identified, although we note that 122.25(a)(11)(i) may not be applicable to

Missouri, as Appendix VI of 40 CFR Part 264, to which 122.25(a)(11)(i) refers, lists no Missouri counties. For the same reason, 122.25(a)(11)(ii) is inapplicable to Missouri.

40 CFR 122.25(a)(11)(ii) and (iv) require specific information concerning the location of a facility in a 100-year floodplain, and how the facility will be protected from floods, or how the wastes will be moved from the facility on threat of flood. 10 CSR 25-7.011(2)(C) itself requires only that the permit application map show the 100-year floodplain area. See 10 CSR 25-7.011(2)(C)2.A(II)(i). However, 10 CSR 25-7.011(3)(H)2, like 40 CFR 264.18(b), contains a general requirement that facilities located in a 100-year floodplain be protected from washout, unless the operator can demonstrate that the wastes will be moved to prevent contact with flood waters. 10 CSR 25-7.011(3)(H)3 then requires the operator to demonstrate compliance with paragraph 7.011(3)(H)2 by using the analysis described in 40 CFR 122.25(a)(11). Therefore, we believe that 10 CSR 25-7.011(2)(C)2, in conjunction with 10 CSR 25-7.011(3)(H)2 and (3)(H)3, will necessarily require the permit applicant to develop and submit the information required by 40 CFR 122.25(a)(11)(iii) and (iv).

40 CFR 122.25(a)(11)(v) requires an existing facility not in compliance with the floodplain standards to submit with the application a plan showing how and when the facility will be brought into compliance. Although 10 CSR 25-7.011(3)(H)3 incorporates 40 CFR 122.25(a)(11) by reference, Commission regulations prohibits use of a compliance schedule, as 10 CSR 25-7.011(2)(C)4.A requires compliance with all facility standards before a permit can be issued, without regard to the status as a new or existing facility.

40 CFR 122.25(a)(12) requires submission of an outline of training programs required by the federal equivalent to 10 CSR 25-7.011(3)(F). We believe 10 CSR 25-7.011(2)(C)2 can reasonably be interpreted to require such an outline in the state application. 40 CFR 122.25(a)(13) requires submission of a copy of the closure plan, and post-closure plan, if applicable. 10 CSR 25-7.011(9)(B)1 and (9)(E)1 expressly require the submission of these plans with the state application.

40 CFR 122.25(a)(14) requires submission of proof that, as to existing facilities, the notice required by 40 CFR 264.120 (equivalent to 10 CSR 25-7.011(9)(F)3) has been recorded in the chain of title. The state regulations require the notice to be filed at closure of the facility, not at some earlier time. Further, 40 CFR 264.120 appears not to require filing of the notice at any time prior to closure. While this notice relates only to Component C facilities, not the subject of the state's present application for interim authorization, and thus the state need not have an equivalent provision at this time, we are puzzled

by the requirement of 40 CFR 122.25(a)(14). We suggest that prior to preparing its application for final authorization the Department inquire of EPA whether it intended the result indicated by 40 CFR 122.25(a)(14).

40 CFR 122.25(a)(15) and (16) require submission of the current estimate of closure and post-closure costs, plus copies of the financial assurance mechanisms required under 40 CFR Part 264, Subpart H. 10 CSR 25-7.011(2)(C), first paragraph, requires submission of the financial instruments with the application. However, no provision of the state regulations requires submission of either the closure or post-closure cost estimates with the permit application. Those estimates would be required for the first time under the state regulations on March 15 of the first year of operations under a permit. See 10 CSR 25-7.011 (6)(C)1.B. Of course, as the post-closure estimates apply only to Component C facilities, for which the state is not currently seeking authorization, 40 CFR 122.25(a)(16) is not presently applicable to the state.

40 CFR 122.25(a)(17) requires submission of a copy of the liability insurance policy required by 40 CFR 264.147, or demonstration of compliance with the alternative financial responsibility requirements of that section. We believe that the Commission intended by 10 CSR 25-7.011(2)(C), first paragraph, when it required submission of "financial instruments meeting the requirements of 10 CSR 25-7.011(8)", that the liability insurance policy be submitted. However, we have some reservations whether the term "financial instrument" includes a demonstration that the applicant meets the financial test which 40 CFR 264.147(f) allows as an alternative to an insurance policy. However, because under 10 CSR 25-7.011(2)(C)4.A the permit cannot be issued until the facility meets the requirements of 10 CSR 25-7.011(8), which adopts 40 CFR 264.147, the required information will as a practical matter have to be submitted at some point in the permit review process. 40 CFR 122.25 (a)(18), respecting proof of coverage of a state financial mechanism, is inapplicable to Missouri, as no such mechanisms exist.

40 CFR 122.25(a)(19) requires the submission of a topographic map containing specified information. 10 CSR 25-7.011 (2)(C)2.A requires such a map as part of the state application. Under the state regulation the map must contain almost all the information required by the federal regulation. However, identification of barriers for drainage or flood control (122.25 (a)(19)(xi)) is not required. Further, the map required by 10 CSR 25-7.011(2)(C)2.A(I) need not have a minimum scale of 1 inch to 200 feet, as required by the federal provision. The maps required under 10 CSR 25-7.011(2)(C)2.A(II) and (III) do meet the federal scale requirements. In addition, the structures mentioned in the parenthetical clause in 122.25(a)(19)(x) are not all

expressly included in 10 CSR 25-7.011(2)(C)2.A. We do not know whether the term "structures", as used in 10 CSR 25-7.011(2)(C)2.A(II)(c), would include everything referenced in 40 CFR 122.25(a)(19)(x) and not specifically mentioned elsewhere in the state regulation. We note that the state map need not show injection wells, as they are unlawful under § 577.155.

40 CFR 122.25(b)(1)(i) requires submission of considerable information concerning the containment system for facilities storing containers of waste. The state regulations do not contain a like provision. 10 CSR 25-7.011(2)(C)2, in requiring a demonstration of how the containment system requirements in 10 CSR 25-7.050 are being met, will undoubtedly require some of the information specifically required by 40 CFR 122.25(b)(1)(i). However, we are not technically qualified to judge whether all such information is required by the state regulation. 40 CFR 122.25(b)(1)(ii) requires submission of certain information if the facility operator is to take advantage of the exception from containment system requirements found in 40 CFR 264.175(c). As 10 CSR 25-7.050(3)(G) does not provide for this exception, 40 CFR 122.25(b)(1)(ii) is inapplicable.

40 CFR 122.25(b)(1)(iii) requires submission of sketches, drawings or data demonstrating compliance with buffer zone and physical separation requirements for ignitable, reactive and incompatible wastes, found in the federal equivalents to 10 CSR 25-7.050(3)(D)3 and (3)(G). We think it likely that 10 CSR 25-7.011(2)(C)2 will require the submission of similar information as part of the state application. 40 CFR 122.25(b)(1)(iv) requires a description of the procedures to be used in handling incompatible wastes and materials, so as to comply with the federal equivalents of 10 CSR 25-7.011(3)(G) and 7.050(3)(D). We think it likely that 10 CSR 25-7.011(2)(C)2 requires submission of this information as well.

40 CFR 122.25(b)(2)(i)-(v) require the submission of specific information about the design of waste storage and treatment tanks. As 10 CSR 25-7.050(4) is equivalent to the federal regulations referenced in 40 CFR 122.25(b)(2), we think it likely that 10 CSR 25-7.011(2)(C)2 will require submission of much of the information required under the federal provision. Because of the technical nature of these requirements, we cannot say whether all information specified in the federal provision is required by 10 CSR 25-7.011(2)(C)2.

40 CFR 122.25(b)(2)(vi) requires submission of procedures for handling incompatible, ignitable or reactive wastes in tanks, including use of buffer zones. 10 CSR 25-7.050(4)(C) and (4)(E) contain provisions regarding handling of those types of wastes which are equivalent to federal facility standards for tanks.

Therefore, we believe 10 CSR 25-7.011(2)(C)2 can reasonably be read to require the submission of the type of information called for in 40 CFR 122.25(b)(2)(vi).

40 CFR 122.25(b)(3), (b)(4), (b)(6) and (b)(7), and 122.25(c) all relate to Component C facilities. No comparison to state regulations is required for purposes of the state's present application for interim authorization. 40 CFR 122.25(b)(5) relates to informational requirements for hazardous waste incinerator permits. As noted in Part X.I, supra, the provisions at 10 CSR 25-7.020(10) are virtually identical to 40 CFR 122.25(b)(5).

We have identified above a few instances where the state regulations may not require the submission with the permit application of all the information called for by the federal regulations. We find it impossible to judge whether the possible absence from the state permit application of a small portion of the information which the federal regulations require defeats the substantial equivalency of the state regulations. Therefore, we must leave it to EPA to make this judgment. We do note that 10 CSR 25-7.011(2)(C)2.A(II)(n) allows the Department to request other relevant information, as part of the plan view drawings or topographic map. We believe that EPA should take this authority into consideration in arriving at its judgment concerning the equivalency of the state's permit application information requirements.

C. State statutes and regulations which provide for the protection of confidential information do not allow the name and address of the permit applicant or permittee to be entitled to such treatment. (See 40 CFR 123.129(d), 123.7 and 122.19).

Citation of Laws and Regulations

Section 260.430.1.

Explanation of Legal Authority

Section 260.430.1 provides for confidential treatment of certain business information submitted to the Department or Commission under the state program. Information is entitled to confidential treatment only when requested in writing, and when a justification is provided showing that the information constitutes trade secrets or is necessary "to protect any plan, process, tool, mechanism or compound which is known only to the person claiming confidential treatment and where confidential treatment is necessary to protect such person's trade, business or manufacturing process." While the statute does not expressly state

that the name and address of the permit applicant or permittee is not entitled to confidentiality, we believe the statute clearly is inapplicable to such information.

The statute speaks of confidential treatment for trade secrets, and other information relating to a plan, tool, mechanism, compound or process. The name and address of the applicant or permittee clearly does not fall within the category of items subject to protection. As Section 260.430.1 requires all other information to be made available to the public, the applicant's or permittee's name and address will always be public information.

- D. State statutes and regulations require that permit applications be signed by persons authorized to bind the facility under state law and contain a certification that the information contained in the application is true and accurate. (See 40 CFR 123.129(d), 123.7 and 122.6).

Citation of Laws and Regulations

Sections 260.370, 260.395.7; 10 CSR 25-7.011

Explanation of Legal Authority

Section 260.395.7 provides that the application for a facility permit shall be on a form provided by the Department. Section 260.370.3(1)(d) empowers the Commission to adopt regulations setting standards for permit issuance. Regulation 10 CSR 25-7.011(2)(C)3.A provides that permit applications may be signed only by certain categories of persons. For a corporation, an executive officer of at least vice-presidential level must sign. For partnerships, a general partner's signature is required. For a sole proprietorship, the proprietor must sign. And for municipal corporations and other public agencies, a principal executive officer or ranking elected official must sign. 10 CSR 25-7.011 (2)(C)3.A is identical to 40 CFR 122.6(a).

With regard to a sole proprietor, the binding effect of the proprietor's signature is obvious. Further, there is no question that a general partner has the authority to bind a partnership. Chapin v. Cherry, 147 S.W. 1084 (Mo. 1912); Midland Nat. Bank v. Schoen, 27 S.W. 547 (Mo. 1894). However, as to a corporation, municipal corporation or government agency, it is less clear that a vice-president, or a ranking elected official, would have the inherent authority to bind the corporation or agency in all cases. See, eg., Stevens Davis Co. v. Sid's Petroleum Corp., 157 S.W.2d 246 (St.L.Ct.App. 1942).

As to corporations, municipal corporations and government agencies, we believe that it is not necessary to inquire whether the officer who signs the application has the authority to bind the corporation or agency. While one could argue that the mere submittal of the application, along with a check for the filing fee required by 10 CSR 25-7.011(2)(C), would constitute apparent authority, the better approach is to rely on the doctrine of ratification to bind the permittee. Once the corporation or agency commences any work under the permit issued in its name, it would be deemed to have accepted the benefits thereof, and would be bound by the permit, on the theory of ratification by implication. Cf. Farmers and Merchants Bank of St. Clair v. Burns and Hood Motor Co., 295 S.W.2d 199 (St.L.Ct.App. 1956).

10 CSR 25-7.011(2)(C) requires that each permit application must contain the certification set forth in that subparagraph. Summarized, the signatory must certify that he has examined and is familiar with the information in the application, and that based on the inquiry he has made, he believes the information to be true, accurate and complete. The certification required by the state regulation is identical to that required by 40 CFR 122.6(d).

- E. State statutes and regulations require that the state make available for public comment prior to permit issuance, information substantially equivalent to that required at 40 CFR 124.6 and 124.8. (See 40 CFR 123.129(d) and 123.7).

Citation of Laws and Regulations

Sections 260.370, 260.395.8; 10 CSR 25-8.010

Explanation of Legal Authority

Section 260.395.8 sets forth certain statutory requirements for public notice and opportunity for the public to participate in the permitting process. In addition, §§ 260.370.3(1) and 260.370.3(1)(d) empower the Commission to adopt regulations governing requirements for public notice and public participation in the permitting process. The Commission has in 10 CSR 25-8.010 adopted requirements for public notification and public involvement in the permit issuance process which are generally equivalent to the federal scheme of public participation. The state procedures include public notification of tentative decisions, preparation of fact sheets and draft permits, opportunity for public comment and public hearing, and response to comments received. The state regulation contains additional procedural requirements mandated by the Missouri Hazardous Waste Management Law. We will discuss below only those areas where the state

regulations do not appear to contain a requirement identified in 40 CFR 124.6 and 124.8. Otherwise, the reader is referred to the detailed comparison of regulations contained in Appendix VIII of the Application for Interim Authorization.

40 CFR 124.6(b) provides that if the issuing authority tentatively decides to deny an application, he must issue a notice of intent to deny, which shall conform to the requirements concerning draft permits. Subsection 124.6(b) goes on to provide that if the issuing authority later wishes to reverse his position concerning denial, he must withdraw his tentative decision to deny, and issue a new tentative decision and draft permit. 10 CSR 25-8.010(1)(E)1 provides for the issuance of a tentative decision to deny and fact sheet. However, the state regulation makes no provision for issuance of a new tentative decision, fact sheet and draft permit if the Director decides, after issuance of a tentative decision to deny, that the permit should be issued.

40 CFR 124.6(d)(2) requires that the draft permit include all compliance schedules. As we have explained elsewhere in this memorandum, the Commission's regulations do not appear to allow the use of compliance schedules in facility permits. Therefore, 40 CFR 124.6(d)(2) is inapplicable.

40 CFR 124.6(e) and 124.10(a)(ii) require that the public be notified that a draft permit has been prepared. While 10 CSR 25-8.010(1)(E)2 requires the preparation of a draft permit, nothing in the regulation requires that the public notice contain any reference to the draft permit.

40 CFR 124.8(a) requires a fact sheet to be prepared, as does the state regulation. However, the state regulation does not require that the fact sheet set forth the principal facts and significant factual, legal, methodological and policy questions considered in preparing the draft permit or tentative decision to deny the permit, as does 40 CFR 124.8(a). Further, 40 CFR 124.8(b)(4) requires the fact sheet to contain a brief summary of the basis for the conditions in the draft permit, "including references to applicable statutory or regulatory provisions." 10 CSR 25-8.010 (1)(F)4 requires that the fact sheet contain a summary of the basis for the proposed permit conditions, but does not require a reference to statutory or regulatory provisions.

40 CFR 124.8(a) provides that the fact sheet is to be sent to anyone who requests a copy. 10 CSR 25-8.010(1)(E)1.G provides for sending the fact sheet only to those persons who have previously requested notification, not to those who may request a copy of the fact sheet after notification of a tentative decision.

Except as identified above, the state regulations contain provisions regarding tentative decisions, draft permits, and fact sheets which are fully equivalent to 40 CFR 124.6 and 124.8. We believe that the federal provisions regarding fact sheets which are missing from the state regulations are relatively minor, and should not defeat substantial equivalency. Further, as the Department would not be precluded from including in fact sheets more information than that required by 10 CSR 25-8.010(1)(F), any present deficiency in the state regulation which EPA believes is substantial can be cured by an agreement between the Department and EPA to provide the additional information in state issued fact sheets. The same agreement could cover federal requirements concerning making fact sheets and draft permits available to the public.

- F. State statutes and regulations require that notice be issued to the public of preparation of the document containing the information at XI.E or draft permit and scheduling of a public hearing. (See 40 CFR 123.129(d), 123.7 and 124.10(a)).

Citation of Laws and Regulations

Sections 260.370.3, 260.395.8; 10 CSR 25-8.010

Explanation of Legal Authority

Section 260.395.8(1) requires that prior to issuing or renewing a facility permit, the Department must give public notice by press release or advertisement, and give notice to adjoining property owners and local governments. In the case of disposal facilities, § 260.395.8(2) requires that notice must be given to property owners within a mile radius of the facility, as well as requiring public notice by press release and advertisement. For disposal facilities, a public hearing must be held. As to other facilities, a public hearing must be held if requested. Section 260.370.3(1)(d) further empowers the Commission to adopt regulations concerning the issuance of permits.

10 CSR 25-8.010(1)(E) provides that upon making a tentative decision to issue or deny a permit application, the Department must make that decision known by issuing a news release, with accompanying fact sheet, targeted to news media in the area of the proposed facility, advertisement in local newspapers and on local radio stations, and mailing the news release and fact sheet to local governments, adjoining landowners (or in the case of a disposal facility, to landowners within a mile of the facility boundaries), and to anyone else who has previously requested notification.

10 CSR 25-8.010(l)(F)8 requires that the fact sheet contain an invitation to submit comments on the tentative decision, and an explanation of how to request a public hearing. 10 CSR 25-8.010(l)(G) provides that if a hearing is requested, or if a hearing is mandatory because a disposal facility permit is at issue, the Department must schedule the hearing and give public notice thereof. Public notice of the hearing is accomplished under 10 CSR 25-8.010(l)(G) in the same fashion as under 8.010(l)(E) in relation to tentative decisions.

We note two instances in the state regulations where procedures regarding issuance of public notices and scheduling of hearings do not appear to meet federal requirements. First, unlike 40 CFR 124.10(a)(ii), the state regulations do not require the initial public notice to state that a draft permit has been prepared and is available for review, or to make any other reference to the draft permit. Second, 10 CSR 25-8.010(l)(G) provides that as to facilities other than disposal facilities, a public hearing is to be scheduled if requested within 30 days after issuance of the news release. 40 CFR 124.12(a) allows 45 days for the public to request a hearing.

G. State statutes and regulations require that the public notice contain information substantially equivalent to that in 40 CFR 124.10(d)(1)(i)-(v) and (ix), 124.10(d)(2) and 124.10(e). (See 40 CFR 123.7).

Citation of Laws and Regulations

10 CSR 25-8.010

Explanation of Legal Authority

The above-referenced federal regulations concern the contents of public notices issued in the permitting process, and to whom those notices are sent. 10 CSR 25-8.010(l)(E)-(G) contain similar requirements. We will compare these provisions below.

40 CFR 124.10(d) requires all public notices issued as part of the permit issuance process to contain certain specified information. Under the state regulation, information required in the notice of a tentative decision to issue or deny a permit is found in 10 CSR 25-8.010(l)(F) relating to the contents of fact sheets. Under 10 CSR 25-8.010(l)(E), the fact sheet is to be sent with the public notice. As for notices concerning the scheduling of public hearings, 10 CSR 25-8.010(l)(G) specifies the informational content of the notices. We interpret 40 CFR 124.15, regarding notification of the issuance of permits, and 40 CFR 124.17, regarding response to comments submitted on the tentative decision, not to require full public notice, and therefore not to be subject to 40 CFR 124.10(d).

40 CFR 124.10(d)(1)(i) requires each notice to give the name and address of the office processing the permit application. 10 CSR 25-8.010(1)(G)2 requires the notice of hearing to contain the name and address of the Department. For a notice of tentative decision, 10 CSR 25-8.010(1)(F)7 expressly requires only the name and telephone number of the person within the Department from whom additional information may be obtained. However, 10 CSR 25-8.010(1)(F)8 requires the fact sheet to contain an invitation to submit comments. We think it quite unlikely that this request for comments would not also contain an address where comments would be submitted. We also think it unlikely that the news release under 10 CSR 25-8.010(1)(E) would fail to mention that the Department is making the tentative decision. Therefore, we do not believe that the state regulation contains a substantial deficiency in this regard.

40 CFR 124.10(d)(1)(ii) requires the notice to contain the name and address of the applicant, and of the facility, if different. 10 CSR 25-8.010(1)(F)2 meets this requirement, but 10 CSR 25-8.010(1)(G)2 does not require identification of the address or location of the facility, if different than the applicant's address. We feel this is a very minor omission, as any notice in this regard would logically include the facility location, even if not expressly required in the regulation.

40 CFR 124.10(d)(1)(iii) requires notices to contain a brief description of the business conducted at the facility for which a permit is being sought. 10 CSR 25-8.010(1)(F)1 contains this requirement, but 8.010(1)(G)2 does not.

40 CFR 124.10(d)(1)(iv) requires each notice to contain the name, address and telephone number of the person from whom additional information may be obtained. 10 CSR 25-8.010(1)(G)2 contains this requirement, but 8.010(1)(F)7 fails to specify that the address of this person must be stated.

40 CFR 124.10(d)(1)(v) requires notices to contain a brief description of the comment procedures, the time and place of any scheduled hearing or a statement of the procedures to request a hearing, and "other procedures by which the public may participate in the final permit decision." 10 CSR 25-8.010(1)(F)8 and (1)(G)1 fully meet the federal requirements as to comment procedures, requesting a hearing, and time and place of a scheduled hearing. The state regulation makes no provision for notification of other procedures by which the public can participate in the final decision. We are puzzled by this federal requirement, as we can discern no other requirement for public participation after the comment period has expired or a hearing has been held. We do not believe that the last requirement of 40 CFR 124.10(d)(1)(v) is of any relevance in determining whether state public notice provisions are equivalent to federal requirements.

40 CFR 124.10(d)(1)(ix) requires public notices to contain "any additional information considered necessary or proper." The state regulation does not contain a similar provision. Nothing in the state statute or regulations would prevent the Department from including additional information in a notice or fact sheet. Further, we are confident that if in a particular case additional information were pertinent, the Department would see fit to include it. Therefore, we see no lack of equivalency by the absence of a provision like 40 CFR 124.10(d)(1)(ix).

40 CFR 124.10(d)(2) requires that the notice of a public hearing include specified information. 10 CSR 25-8.010(l)(G)2 requires identical information. Finally, 40 CFR 124.10(e) requires that a copy of the fact sheet, permit application, and draft permit be mailed to the applicant, and to certain specified governmental agencies with regulatory responsibility, as listed in 40 CFR 124.10(c)(1)(i)-(iii). 10 CSR 25-8.010(l)(E) does not require that the draft permit be sent to anyone, including the applicant. A fact sheet must be sent to the applicant under 10 CSR 25-8.010(l)(E)1.F. It would serve no purpose to send a copy of the application to the applicant. The state regulation does not require the notice, fact sheet, application or draft permit to be sent to any of the agencies listed in 40 CFR 124.10(c)(1)(ii) and (iii).

We are not able to judge whether the above differences between the state and federal regulations render the state provisions inequivalent. However, it would appear that any inequivalency identified by EPA could be corrected for the purposes of interim authorization by an agreement between the Department and EPA that state notice procedures would meet the federal requirements.

H. State statutes and regulations require that the notice be published in major local newspapers and broadcast over local radio stations and be sent to each unit of local government having jurisdiction over the area in which the proposed facility seeks to locate and other state agencies with authority over facility construction or operation. (See Solid Waste Disposal Act Amendments of 1980, P.L. 96-482, Section 26).

Citation of Laws and Regulations

Section 260.395.8; 10 CSR 25-8.010

Explanation of Legal Authority

10 CSR 25-8.010(l)(E)1 and (G)1 require that the public notice regarding a proposed permit decision and any public hearing be sent to news media in the affected area, broadcast over

local radio stations, and published in a newspaper of general circulation serving the area. In addition, the city (if any) and county in which the facility is to be located are to be notified by mail. All record owners of adjacent property, or in the case of a disposal facility all record owners of the property within one mile of the facility boundary, are notified by mail, as required by § 260.395.8. No state agency other than the Department of Natural Resources has any authority over the construction or operation of a hazardous waste facility located in Missouri. Therefore, it is unnecessary to mention notification to any other agency. 10 CSR 25-8.010 meets the requirements of Section 26 of P.L. 96-482.

- I. State statutes and regulations allow any interested person to submit written comments. (See 40 CFR 123.129(d), 123.7 and 124.11).

Citation of Laws and Regulations

10 CSR 25-8.010

Explanation of Legal Authority

10 CSR 25-8.010(l)(D) makes it clear that any interested person may submit written comments. Where a public hearing is held, those comments may be submitted up to seven days after the hearing. 10 CSR 25-8.010(l)(G)3.

- J. State statutes and regulations provide for informal public hearings if the state receives written opposition and a request for a hearing within 45 days of publication of the notice. (See Solid Waste Disposal Act Amendments of 1980, P.L. 96-482, Section 26).

Citation of Laws and Regulations

Section 260.395.8; 10 CSR 25-8.010

Explanation of Legal Authority

Section 260.395.8 requires a public hearing to be held, if requested, without regard to opposition to the proposed permit. 10 CSR 25-8.010(l)(G) provides that a hearing will be held if requested in writing within 30 days after the public notice is issued. We cannot say whether EPA will view a period of 30 days as substantially equivalent to 45 days.

- K. State statutes and regulations require that such public hearing allow the presentation of written and oral comments and be conducted in a manner substantially equivalent to the requirements of 40 CFR 124.17. (See 40 CFR 123.129(d) and 123.7).

Citation of Laws and Regulations

10 CSR 25-8.010

Explanation of Legal Authority

10 CSR 25-8.010(1)(G)4 makes it clear that both written and oral comments may be presented at the hearing. Further, 10 CSR 25-8.010(1)(H) provides that at the time of permit issuance the Department must specify changes made from the draft permit, describe and respond to significant comments, and make the response to comments available to the public. Thus, the state regulation conforms to 40 CFR 124.17.

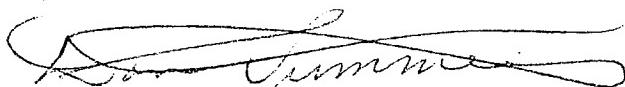
- L. Statutes and regulations require that written responses to significant comments be made available to the public. (See 40 CFR 123.129(d), 123.7 and 124.17).

See the preceding subpart.

CONCLUSION

We have in the preceding memorandum addressed those areas requested of us in the format suggested by EPA. In general, we believe that the state regulations adopted under the Missouri Hazardous Waste Management Law, and fugitive dust regulations adopted by the Missouri Air Conservation Commission, compare favorably with EPA regulations, and can be judged substantially equivalent to the federal regulations. We are unable to judge whether EPA will find any of the relatively few differences between state and federal regulations noted in our memorandum to constitute a lack of substantial equivalency between the state and federal programs as a whole.

Respectfully submitted,



DAN SUMMERS
Assistant Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

June 1, 1983

OPINION LETTER NO. 42-83

The Honorable James L. Mathewson
Senator, District 21
Room 319, State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Mathewson:

This letter is in response to your request for our opinion as follows:

What is the definition of the term "ambulance association"?

Can private ambulance companies be included in the term "ambulance association" under Mo. statute 307.175?

In the statement of facts accompanying your request you state:

The owner of an ambulance company wants to provide permits to his people to use blue lights and sirens when they are enroute in their private vehicles to pick up an ambulance for a run, should the need ever arise.

Section 307.175, RSMo Supp. 1982, provides in pertinent part:

Motor vehicles and equipment which are operated by any member of an organized fire department, ambulance association, or rescue squad, whether paid or volunteer, may be operated on streets and highways in this state as an emergency vehicle under the provisions of section 304.022, RSMo, while responding to a fire call or ambulance call or at the scene of a fire call or ambulance call and while using or sounding a warning siren and while using or displaying thereon fixed, flashing or rotating blue lights, but sirens and blue lights shall be used only in bona fide emergencies. . . .

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The Honorable James L. Mathewson

It is our purpose to examine Section 307.175 in such a way as to glean the intent of the legislature. As you are aware, the General Assembly did not provide a definition of the phrase "ambulance association" in Chapter 307.175. In the absence of a statutory definition, we are required to assign the words and phrases used their plain, ordinary meaning. State ex rel. C.C.G. Management Corp. v. City of Overland, 624 S.W.2d 50 (Mo.App. 1981).

Webster's New International Dictionary (2nd Edition, 1935) defines an association as "[a] union of persons in a society for some particular purpose." Similarly, the word "company" is defined as "[a]n association of persons for a joint purpose or performance." Id. at 543. Thus, while the word "association" is not a term of art and lacks the necessary precision to give a clear indication of the legislature's intention, we believe that for purposes of Section 307.175, an ambulance association includes both public and private organizations organized to provide ambulance service and permitted by the state to do so. This holding is consistent with our Opinion Letter No. 90-81, Patterson, 1981, in which we stated:

It is our view that the term "ambulance association" as used in § 307.175 [RSMo 1978] should not be given a meaning which would be unduly restrictive The term "association" is often used in a generic or general sense, and it is our view that it should be given a general meaning

Your statement of facts presents a second question, namely, whether travel to pick up an ambulance by an employee of an ambulance company is "responding to . . . [an] ambulance call" for purposes of Section 307.175. We believe that travel to pick up an ambulance in response to a call for an ambulance is consistent with, and a necessary precondition to, an ability to respond to such a call. See City of Canton v. Snyder, 151 N.E.2d 15 (Ohio 1958). Thus, we believe that the use of sirens and flashing blue lights by permitted employees while enroute to pick up an ambulance in response to a bona fide emergency is authorized by Section 307.175.

In conclusion we note the following legislative caveat: Section 307.175 expressly provides:

Permit to use a siren or lights as heretofore set out does not relieve the operator of the vehicle so equipped with complying with all other traffic laws and regulations. . . .
[Emphasis added.]

The Honorable James L. Mathewson

Clearly, persons permitted to display flashing blue lights and sound a siren in responding to a bona fide ambulance call may not ignore posted speed limits, traffic control signs and devices, or other traffic laws and regulations.

Very truly yours,



JOHN ASHCROFT
Attorney General

CONSTITUTIONAL LAW:
FIRE PROTECTION DISTRICTS:
HANCOCK AMENDMENT:
TAXATION:

prior to the imposition of such a levy by a newly-formed fire protection district.

Article X, Section 22(a), Missouri Constitution, requires voter assent to a specific proposed fire protection district levy

February 10, 1983

OPINION NO. 44-83

Paul E. Oesterreicher
Prosecuting Attorney
Post Office Box 482
Moberly, Missouri 65270

FILED

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Dear Mr. Oesterreicher:

This is in response to your request for an opinion as follows:

Does the majority vote of the voters to incorporate a fire protection district and elect initial directors pursuant to Chapter 321, RSMo, and then the district's directors voting to levy a tax of 30¢ per \$100 valuation, pursuant to Section 321.240, RSMo, comply with the requirements of Article X, Section 16-24 of the Missouri Constitution (known as the Hancock Amendment) that political subdivisions are prohibited from levying any tax not authorized by law when the amendment was adopted without the approval of the required majority of the qualified voters?

Your request indicates that the people of the fire protection district in question voted to incorporate the fire protection district at the August 3, 1982, election. You further indicate that neither the notice of election nor the official ballot made reference to any tax levy. Following the election, the first board of directors of the fire protection district voted to assess the levy described in your question pursuant to Section 321.240, RSMo Supp. 1982.

A fire protection district is a political subdivision of the state. Section 321.010.1, RSMo Supp. 1982, provides in pertinent part:

Paul E. Oesterreicher

A "fire protection district" is a political subdivision which is organized and empowered to supply protection by any available means to persons and property against injuries and damage from fire. . . . [Emphasis added]

See also, Article X, Section 15, Missouri Constitution.

Article X, Section 22, Missouri Constitution, provides in pertinent part:

(a) Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, . . . when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon. . . .

Section 321.240, RSMo Supp. 1982, provides in pertinent part:

To levy and collect taxes as herein provided, the board shall in each year determine the amount of money necessary to be raised by taxation, and shall fix a rate of levy which, when levied upon every dollar of the taxable tangible property within the district as shown by the last completed assessment, and with other revenues, will raise the amount required by the district annually to supply funds for paying the expenses of organization and operation and the costs of acquiring, supplying and maintaining the property, works and equipment of the district, and maintain the necessary personnel, which rate of levy shall not exceed thirty cents on the one hundred dollars valuation; . . . [Emphasis added]

In Roberts v. McNary, 636 S.W.2d 332 (Mo. banc 1982), the Missouri Supreme Court held that fees charged by a county for services could not be raised without voter approval. St. Louis County argued that since the voters had given authority to levy an unspecified fee prior to the adoption of the Hancock Amendment, subsequent voter approval of a specific fee was not required by the Hancock Amendment. The court stated:

Paul E. Oesterreicher

The first phrase of § 22(a) means that it does not affect any license or fee specific in amount which, although authorized at the time of the adoption of the Hancock Amendment, had not yet actually been imposed. The second phrase states that any license or fee existing [i.e., actually imposed] at the time the Hancock Amendment was adopted could not be increased without complying with § 22(a). Therefore, appellants' assertion that a county can impose a license or fee under an enabling authority which sets no specific dollar amount or rate without complying with Art. X, § 22(a) must fail. [Emphasis added] Id. at 337.

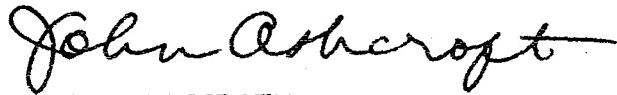
We can think of several persuasive legal arguments which militate in favor of the board's ability to set the levy without another vote of the people, not the least of which is the clear indication by the voters that they wished to form a fire protection district which would be more than a shell and which would be able to meet their fire protection needs. However, given the Supreme Court's extremely strict interpretation of Hancock Amendment questions heretofore, see, e.g., Boone County Court v. State, 631 S.W.2d 321 (Mo. banc 1982) and Buechner v. Bond, Case No. 64348 (January 11, 1983), we believe that that Court would interpret Article X, Section 22(a), to require a vote of the people prior to any tax being levied.

Finally, in rendering this opinion, we are mindful of Oswald v. City of Blue Springs, 635 S.W.2d 332 (Mo. banc 1982), in which the Supreme Court held that the voters of Blue Springs, Missouri, had authorized increases in water and sewerage rates to cover not only principal and interest but also costs of maintenance and operation when they voted to allow the city to issue revenue bonds. We believe that Oswald is distinguishable from the facts you pose in that there the rate covenant in the bond proposal submitted to the voters made specific reference to an increase in water and sewerage charges. Here, the ballot made no reference to the ability of the fire protection district to impose a levy.

CONCLUSION

It is the opinion of this office that Article X, Section 22(a), Missouri Constitution, requires voter assent to a specific proposed fire protection district levy prior to the imposition of such a levy by a newly-formed fire protection district.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

July 6, 1983

OPINION LETTER NO. 45-83

(CORRECTED)

Mr. Thomas J. Brown, III
Prosecuting Attorney of Cole County
Courthouse, Room 400
Jefferson City, Missouri 65101



Dear Mr. Brown:

You have requested an opinion from this office as to whether the Cole County Recorder of Deeds should record a marriage license issued (several weeks before) and returned by a person perhaps whose credentials as a clergyman you question

In your request you cite Section 451.100, RSMo 1978, which states:

Marriages may be solemnized by any clergyman, either active or retired, who is a citizen of the United States, and who is in good standing with any church or synagogue in this state, or by any judge of a court of record, other than a municipal judge.

Marriages may also be solemnized by a religious society, religious institution, or religious organization of this state, according to the regulations and customs of the society, institution or organization, when either party to the marriage to be solemnized is a member of such society, institution or organization.

The person who performed the marriage ceremony in question is an "evangelist" of a church incorporated in Tennessee which you inform us has but two members in Missouri. We do not intend herein to pass on the qualifications of the person performing the ceremony. That is a matter which you must determine as prosecutor. Irrespective of such qualifications, however, we believe that the Recorder of Deeds has no discretion to refuse to record a license once issued, and therefore, must record the license in question.

Mr. Thomas J. Brown, III

Section 451.150, RSMo 1978, states:

The recorder shall record all marriage licenses issued in a well-bound book kept for that purpose, with the return thereon, for which he shall receive a fee of three dollars to be paid for by the person obtaining the same.

Although provisions of Chapter 451 forbid the recorder from issuing a license to certain minors (Section 451.090); issuing a license to "insane, mentally imbecile or feeble-minded" persons (Section 451.020); and, finally, issuing a "license contrary to the provisions of Section 451.120 [Chapter 451]," in no statute is the Recorder prohibited from recording a license once issued. We conclude, as a result, that under the mandatory language of Section 451.150, the Recorder has no choice but to record the marriage license returned to him. See, e.g., State ex rel. Dreer v. Public School Retirement System, 519 S.W.2d 290 (Mo. 1975); State ex rel. McTague v. McClellan, 532 S.W.2d 870 (Mo.App. 1976); Opinion No. 154, Baldridge, 1965.

Very truly yours,



JOHN ASHCROFT
Attorney General.

COMPENSATION:
COUNTIES:
EX OFFICIO COLLECTORS:
TOWNSHIP COLLECTORS:
TOWNSHIPS:

section 54.320, RSMo Supp. 1982, does not include delinquent taxes.

In determining the compensation of an ex officio collector of a third class township county the total amount levied for any one year calculated under Sec-

February 28, 1983

OPINION NO. 46-83

The Honorable Nicholas L. Swischer
Prosecuting Attorney, Vernon County
110 North Cedar, Box 565
Nevada, Missouri 64772

FILED
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Dear Mr. Swischer:

This opinion is in response to your inquiry as to the amount of fees an ex officio collector of a third class county adopting township organization may receive and keep as a part of his salary for taxes collected. Specifically, you ask whether delinquent taxes should be included when computing the total amount of taxes levied for any one year in determining the compensation of an ex officio collector.

In pertinent part, Section 54.320, RSMo Supp. 1982, allows an ex officio collector in a third class county adopting township organization to collect a commission of three percent of all taxes collected by him including current taxes, back taxes, and delinquent taxes. Additionally, the ex officio collector is allowed a commission of two percent on all back taxes and all delinquent taxes collected by him which are taxed as costs against the persons or entities owing such taxes and collected as other taxes. However, the statute also contains the following limitation:

Other provisions of law to the contrary notwithstanding, the total compensation of ex officio collectors shall not exceed the sum of ten thousand dollars annually, which maximum amounts shall include the costs of any deputy or assistants employed; except that, in all counties wherein the total amount levied for any one year exceeds two million dollars

Nicholas L. Swischer

and is less than four million dollars, the ex officio collector shall present for allowance proper vouchers for all disbursements made by him on account of salaries and expenses of his office and other costs of collecting revenue, which shall be allowed as against the commissions collected by him; and out of the residue of commissions in his hands, after deducting the amounts so allowed, the ex officio collector may retain a compensation for his services not to exceed ten thousand dollars per year; and except that, the maximum compensation herein provided shall not be applicable to ex officio collectors in counties wherein the total amount levied, for any one year exceeds four million dollars. The limitation on the amount to be retained as herein provided applies to fees and commissions on current taxes, but does not apply to commissions on the collection of back and delinquent taxes and ditch and levee taxes.

It has been suggested that delinquent taxes should be included in determining whether the total amount levied for any one year exceeds four million dollars, and where this is so, the compensation limitations are not applicable. We disagree. In dealing with the question of commissions to be paid a county collector, the Missouri Supreme Court has said that statutes authorizing fees and commissions are to be strictly construed against the collector. Kirkpatrick v. Rose, 344 S.W.2d 59, 62 (Mo. 1961). In our opinion, the phrase "total amount levied for any one year" necessarily means current taxes where the proper authority by formal order has declared property at its assessed value and subjected it to taxation at a fixed rate. See, State v. Davis, 73 S.W.2d 406, 407 (Mo. banc 1934).

It is apparent from the language of Section 54.320, RSMo Supp. 1982, that the legislature was well aware of the distinction between current taxes and delinquent taxes. The statute specifically allows the ex officio collector a commission of three percent on delinquent taxes as well as current and back taxes, and an additional commission of two percent on all back and delinquent taxes collected to be taxed as costs against the persons owing such taxes. Furthermore, the statute specifically exempts commissions on the collection of back and delinquent taxes from the compensation limitations. Had the legislature intended to expand the definition of "levy" as set forth in the Davis case, or the term "levied for any one year" as set forth in the statute, to include all outstanding delinquent taxes as well as current ones, it would have said so specifically.

Nicholas L. Swischer

CONCLUSION

It is the opinion of this office that in determining the compensation of an ex officio collector of a third class township county the total amount levied for any one year calculated under Section 54.320, RSMo Supp. 1982, does not include delinquent taxes.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Very truly yours,



JOHN ASHCROFT
Attorney General

UTILITIES:
HANCOCK AMENDMENT:
CONSTITUTIONAL LAW:

Article X, Section 22, Missouri
Constitution, does not apply to
private utility companies.

January 21, 1983

OPINION NO. 48

The Honorable Harriett Woods
Senator, District 13
State Capitol, Room 329
Jefferson City, Missouri 65101



Dear Senator Woods:

This opinion is in response to your question which asks:

Do private utility companies, whose business is regulated by the Public Service Commission and who have exclusive right to provide service, fall under the provisions of Article 10, section 22 of the Constitution, requiring that any increase in fees are subject to a vote of the people?

Article X, Section 22 of the Missouri Constitution states in relevant part as follows:

(a). Counties and other political subdivisions are hereby prohibited from levying any tax, license or fees, not authorized by law, charter or self-enforcing provisions of the constitution when this section is adopted or from increasing the current levy of an existing tax, license or fees, above that current levy authorized by law or charter when this section is adopted without the approval of the required majority of the qualified voters of that county or other political subdivision voting thereon.

By explicit language, Article X, Section 22, applies only to counties and other political subdivisions of the state. Private utility companies are neither counties nor political subdivisions and, therefore, are not subject to the provisions of Article X, Section 22.

The Honorable Harriett Woods

CONCLUSION

It is the opinion of this office that Article X, Section 22, Missouri Constitution, does not apply to private utility companies.

Very truly yours,



JOHN ASHCROFT
Attorney General

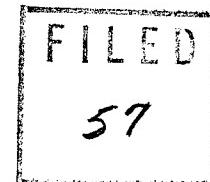
ATHLETIC COMMISSION:
BOXING:
DEPARTMENT OF CONSUMER AFFAIRS,
REGULATION AND LICENSING:

The Director of the Department of Consumer Affairs, Regulation and Licensing is required to regulate kick-boxing matches and exhibitions under the provisions of Chapter 317, RSMo.

June 30, 1983

OPINION NO. 57-83

J. H. Frappier, Director
Department of Consumer Affairs,
Regulation and Licensing
101 Adams
Jefferson City, Missouri 65101



Dear Mr. Frappier:

This is in response to your request for an official opinion asking whether the Director of the Department of Consumer Affairs, Regulation and Licensing has authority to regulate kick-boxing matches and exhibitions.

Section 317.020, RSMO Supp. 1982, provides in pertinent part:

The director of the department of consumer affairs, regulation and licensing of the state of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the state of Missouri, and he shall have the power, and it shall be his duty:

- (1) To make and publish rules and regulations governing in every particular the conduct of boxing, sparring and wrestling exhibitions, the time and place thereof, and the prices charged for admissions thereto;

J. H. Frappier

Section 317.020, RSMo, which was enacted to protect the health, safety, and welfare of those persons engaging in boxing, sparring, and wrestling exhibitions, introduced regulations conducive to the public good and is to be considered remedial in nature. As a remedial statute, Section 317.020, RSMo, is to be construed broadly and liberally to effect its plain purpose. See, Derboven v. Stockton, 490 S.W.2d 301, 309 (Mo.App. 1972) and State ex rel. Ashcroft v. Wahl, 600 S.W. 2d 175, 180 (Mo.App. 1980). Furthermore, in construing remedial legislation, consideration must be given to the evil sought to be cured and "'to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief.' . . . [Citation omitted]."
B.W. Acceptance Corporation v. Benack, 423 S.W.2d 215, 218 (Mo.App. 1967).

The rules of construction also require us to assign the common, ordinary meaning to words used in statutes in the absence of a statutory definition. Roberts v. McNary, 636 S.W.2d 332, 335 (Mo. banc 1982). "Boxing" is defined as "the act or practice of attack and defense with fists, especially when covered with padded gloves." Webster's New International Dictionary (2nd Ed. 1952).

We note that kick-boxing has numerous similarities to traditional boxing. Those similarities include, but are not limited to: the use of a traditional regulation boxing ring; the use of the same equipment (ten (10) ounce boxing gloves, mouth pieces, groin protection); the contestants are divided into similar weights and classes; the bouts do not exceed 15 rounds; the fouls are virtually the same, and are scored the same; the same requirements are necessary for a knockdown; and, in case of a knockdown, the "eight (8) count" is mandatory for both types of boxing. See, 4 CSR 40-5.040 and Karate International Council of Kickboxing (K.I.C.K.) Professional Rules.

The major difference between the two types of boxing is that kick-boxing contestants wear pads on their feet and kick with their feet as well as punch with their hands. The Karate International Council of Kickboxing does not have a minimum kicking requirement, however, some organizations do have such a requirement. The kick-boxing matches and exhibitions sponsored by various organizations differ in their degree of aggressiveness, but not so much that they are dramatically different from traditional boxing, except for the ability of kick-boxing participants to use both padded fists and feet.

J. H. Frappier

Consistent with the rules of construction outlined, and applying a broad, liberal construction to Section 317.020, we believe kick-boxing is but a species of the broad genus, boxing. Thus, boxing includes kick-boxing since the latter contemplates the use of padded fists for attack and defense.

Therefore, it is our view that the Director of the Department of Consumer Affairs, Regulation and Licensing is required to regulate kick-boxing matches and exhibitions.

In issuing this opinion, we are cognizant of Opinion No. 18, Butler, 1979, where it was stated at page 3: "[T]he Office of Athletics cannot define boxing, sparring, or wrestling by rule or regulation to include full contact karate." Opinion No. 18 and this opinion do not conflict because karate is not a form of boxing and cannot reasonably be included within any of the terms boxing, sparring, or wrestling, whereas kick-boxing is but a form of boxing. As such, kick-boxing falls within the statutory term.

CONCLUSION

It is the opinion of this office that the Director of the Department of Consumer Affairs, Regulation and Licensing is required to regulate kick-boxing matches and exhibitions under the provisions of Chapter 317, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Margaret Keate.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

February 24, 1983

OPINION LETTER NO. 61-83

Dr. Arthur L. Mallory
Commissioner of Education
Department of Elementary and
Secondary Education
Jefferson State Office Building
Jefferson City, Missouri 65105

FILED

61

Dear Dr. Mallory:

This letter is in response to your request for our review and certification of the Department of Elementary and Secondary Education's State Plan for Part B of the Education of the Handicapped Act as amended by P.L. 94-142 for the fiscal years 1984-1986 inclusive.

Our review has taken into consideration the Education of the Handicapped Act, as amended (20 U.S.C. §§ 1401 et seq., as amended), and the regulations promulgated pursuant thereto (34 CFR Part 300); Article IX, Sections 1(a), 2(a), and 2(b), Missouri Constitution; Sections 161.092 and 162.670 to 162.995, RSMo 1978; and related provisions.

Based on this review, it is the opinion of our office that:

1. The Missouri Department of Elementary and Secondary Education is the state educational agency as defined in 20 U.S.C. § 1401(7) and has the authority under state law to submit the State Plan and to administer or supervise the administration of the Plan.

2. All the provisions of the Plan are consistent with applicable state law.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

April 7, 1983

Note: See City of Revere v.
Massachusetts General Hospital,
51 U.S.L.W. 5008 (decided 6/27/83)

OPINION LETTER NO. 67-83

The Honorable Joe Moseley
Prosecuting Attorney, Boone County
Boone County Courthouse
Columbia, Missouri 65201

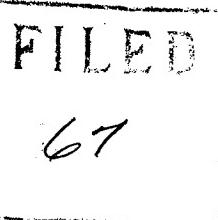
Dear Mr. Moseley:

This is in response to a request for an opinion of this office as follows:

1. Are costs of medical treatment provided to an inmate who is confined in the Boone County jail, the responsibility of the county or inmate:
 - a. if the inmate is solvent?
 - b. if the inmate is insolvent?
2. What costs of incarceration may be charged against an inmate convicted of a misdemeanor or felony and sentenced to the Boone County Jail?
3. May the Sheriff of Boone County hold property on the person of an inmate at the time of arrest until such times as the inmate pays for the costs of his incarceration?
4. What legal remedies are available to the County to collect the costs of incarceration, of an inmate of the Boone County Jail?

It should be noted at the outset that this opinion refers only to prisoners being held pending a criminal trial.

In response to your first question, our Opinion No. 21-82 concluded that counties generally must provide necessary medical care for persons in their legal custody. That opinion did not



The Honorable Joe Moseley

answer the question of ultimate responsibility for payment to the provider of such medical services.

Section 550.010, RSMo 1978, provides:

Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for the cost of incarceration, including a reasonable sum to cover occupancy costs, shall be paid by the state or county. [Emphasis added]

Section 550.020.1, RSMo 1978, provides:

In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. [Emphasis added]

Section 550.030, RSMo 1978, provides:

When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant. [Emphasis added]

In our Opinion Letter No. 8-70, this office concluded that medical expenses incurred on behalf of a prisoner are not costs of prosecution and cannot be taxed against the state or the county as costs. We also concluded in that opinion that the county court has authority to provide for the payment of medical expenses incurred by indigent county prisoners.

The Honorable Joe Moseley

There being no statutory provision for the payment of medical expenses of one incarcerated in a county jail by the state or the county, the resolution of questions relating to the county's responsibility to the provider of medical services is entirely dependent upon the facts of each case. As we have said, the county has authority to provide medical care for its indigents. Whether the county has legally assumed responsibility for the payment of medical expenses with respect to any particular indigent prisoner is a question of fact. Thus, if the county has contracted with a medical care provider to provide medical care to the prisoner at the time the medical services were rendered, the county, by its contract, is liable in the event the prisoner does not make payment. As we noted in Opinion No. 8-70, it is our view generally that if the prisoner is solvent, he is ultimately responsible for payment.

In answer to your second question, it is our view that Section 221.070, RSMo 1978, provides the answer:

Every person who shall be committed to the common jail within any county in this state, by lawful authority, for any offense or misdemeanor, if he shall be convicted thereof, shall bear the expense of carrying him or her to said jail, and also his or her support while in jail, before he or she shall be discharged; and the property of such person shall be subjected to the payment of such expenses, and shall be bound therefor, from the time of his commitment, and may be levied on and sold, from time to time, under the order of the court having criminal jurisdiction in the county, to satisfy such expenses. [Emphasis added]

In answer to your third question, we know of no statute which gives the sheriff a lien upon property of an inmate. We do not believe that Section 221.070 provides for such a lien. Although the provisions of Section 221.070 have been in effect since Missouri was admitted to the Union we find no court cases construing such provisions. However, in light of the holding of the United States Supreme Court in Fuentes v. Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed.2d. 556 (1972), respecting procedural due process, it is our view that the sheriff has no authority to hold an inmate's property until such payment is made. In such a situation the convicted inmate's property should be levied on pursuant to Section 221.070. For the taxation of medical costs against the prisoner, see Section 221.120, RSMo 1978.

The Honorable Joe Moseley

In answer to your fourth question, we are of the view that Section 221.070, quoted above, clearly sets out the legal steps which should be taken to collect costs of incarceration from a prisoner.

Insofar as medical care is concerned, we have previously concluded with respect to the liability of the State of Missouri that the state is not liable for the medical expenses to which you refer. The state is only responsible for costs as provided in Section 550.020, RSMo 1978. We note that for the last fifty years the Attorney General's Office has taken a consistent stand on the question of taxation of medical costs. It has been suggested that these opinions should be withdrawn in favor of a holding that such medical costs are to be taxed as costs and paid by the state under Miller v. Douglas County, 102 S.W. 996 (Mo. 1907). In that case, by dicta, the court stated that the provisions of Section 221.120 would authorize the payment by the state or the county of medical costs taxed as costs under such section. However, in our Opinion No. 31-65, this office distinguished the case of Miller v. Douglas County. We believe Opinion No. 31-65 remains a proper interpretation of the law.

As we have noted on previous occasions, legislative clarification of the entire subject of criminal costs would be welcomed by this office.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures: Opinion No. 21-82
Opinion No. 8-70
Opinion No. 31-65

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

May 23, 1983

OPINION LETTER NO. 70-83

The Honorable Roger B. Wilson
Senator, District 19
State Capitol Building
Jefferson City, Missouri 65101



Dear Senator Wilson:

This letter is in response to your question asking whether a promotion conducted by a university alumni association is a lottery under the laws of Missouri.

It is our understanding that all of the alumni of a university are eligible to participate in the promotion. Any alumnus enrolling three new members into the association during the campaign will have the opportunity to participate in a drawing at the conclusion of the campaign. The winner, who will be chosen by random drawing, will receive an expense-paid trip for two persons to a foreign destination not yet determined. Any new member recruited will be required to pay membership dues.

Article III, Section 39, Missouri Constitution, states in pertinent part:

The general assembly shall not have power:

* * *

(9) To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; except that, nothing in this section shall be so construed as to prevent or prohibit citizens of this state from participating in games or contests of skill or chance where no consideration is required to be given for the privilege or opportunity of participating or for receiving the award or prize and the term "lottery or gift enterprise" shall mean only those games or contests whereby money or something of value is exchanged directly for the ticket or chance

The Honorable Roger B. Wilson

to participate in the game or contest. The general assembly may, by law, provide standards and conditions to regulate or guarantee the awarding of prizes provided for in such games or contests under the provision of this subdivision.

In Missouri, the elements of a lottery are chance, prize, and consideration. Mobil Oil Corporation v. Danforth, 455 S.W.2d 505, 508 (Mo. banc 1970).

There is no question that this promotional contest includes the first two elements of a prohibited lottery. The element of "prize" is satisfied by the awarding of a trip; the "chance" requirement is supplied by the random drawing for the prize. The question remains whether the time and effort expended in the solicitation of new members constitutes valuable consideration.

Missouri courts have defined valuable consideration as a "right, interest, profit or benefit accruing to one party or some forbearance, loss or responsibility given, suffered or undertaken by the other." Perbal v. Dazor Manufacturing Corp., 436 S.W.2d 677, 697 (Mo. 1968); Atherton v. Atherton, 480 S.W.2d 513, 518 (Mo. App., K.C.D. 1972). Inherent in this concept is that the consideration should be something understood to be such by both parties. Cudd v. Aschenbrenner, 377 P.2d 150, 157 (Or. 1962). In the context of a lottery, services or efforts expended as a condition for entrance into a drawing qualify as consideration only if the services or efforts are more than trivial. Garden City Chamber of Commerce v. Wagner, 100 F.Supp. 769, 772 (E.D. N.Y. 1951) aff'd., 192 F.2d 240 (2nd Cir. 1951); F.C.C. v. American Broadcasting Co., 347 U.S. 284, 294, 98 L.Ed. 699, 74 S.Ct. 593 (1954).

Each person (the participant) in the promotion you describe must search out and persuade at least three persons to undertake a financial obligation to the association. In consideration for this service, the participant earns the opportunity to win an expense-paid trip. We believe the solicitation of new members is a valuable effort rendered by the participant for the opportunity to participate in the drawing. Therefore, we believe the element of consideration is present in the promotion you describe and must conclude that such a promotion constitutes a lottery in violation of the laws of this state.

Very truly yours,



JOHN ASHCROFT
Attorney General

COUNTY COURTS:

The 1982 repeal and reenactment of Section 57.430.1 authorizes county courts to increase the maximum allowable amount of sheriffs' and deputies' actual mileage

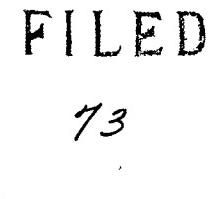
expense reimbursement by two hundred dollars per calendar month.

The additional two hundred dollars per month provision of this statute does not authorize payment in any amount above twenty cents per mile actually driven, nor does it authorize the payment of any compensation in addition to actual mileage reimbursement.

June 1, 1983

OPINION NO. 73-83

Mr. Marvin W. Opie
Prosecuting Attorney
Morgan County
Post Office Box 969
Versailles, Missouri 65084



Dear Mr. Opie:

You have requested an opinion of this office on the following question:

We would like the correct interpretation of the following part of RSMo 57.430: "The County [sic] court may, until January 1, 1985, allow an additional two hundred dollars during any one calendar month for these same official duties." Does this authorize payment in any amount above 20¢ per mile or payment of a flat fee in addition to 20¢ per mile without driving any additional miles?

That portion of the statute quoted in your question was added to subsection 1 of Section 57.430 by H.C.S.H.B. 907 and 1497, 1982 Missouri Laws 218, the title of which reads: "AN ACT to repeal sections 57.295, RSMo 1978 and 57.430 RSMo Supp. 1981, relating to mileage and uniform expenses of sheriffs and deputies; and to enact in lieu thereof two new sections relating to the same subject." We view your question to be whether the authorization for the additional two hundred dollars per month in Section

Mr. Marvin W. Opie

57.430.1, RSMo Supp. 1982,¹ was intended by the General Assembly to be an authorization for additional compensation or a temporary increase in the maximum allowable amount of actual mileage expense reimbursement.

We conclude that the additional two hundred dollars per month provision is a temporary increase in the maximum allowable amount of sheriffs' and deputies' actual mileage expense reimbursement for the following reasons:

1. Section 57.430.1, RSMo Supp. 1982, provides:

In addition to the salary provided in sections 57.390 and 57.400, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed twenty cents per mile, and actual expenses not to exceed twenty cents per mile for each mile traveled, the maximum amount allowable to be four hundred dollars during any one calendar month in the performance of their official duties in connection with the investigation of persons accused of or convicted of a criminal offense. The county court may, until January 1, 1985, allow an additional two hundred dollars during any one calendar month for these same official duties. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. When two or more persons who are summoned, subpoenaed, or served with any process, writ, or notice, in the same action, live in the same general direction, mileage shall be allowed only for summoning, subpoenaing or serving of the most remote.

(Emphasis added.)

Mr. Marvin W. Opie

First, we look to familiar rules of statutory construction.

In construing a statute the legislative intent must be kept in mind, if it may be ascertained, and the whole act, or such portions thereof as are in pari materia, should be construed, together. *** [citations omitted] Since the title to an act *** is itself a legislative expression of the general scope of the bill, it may be looked to as an aid in arriving at the intent of the Legislature. *** [citations omitted]

Sharp v. Producers' Produce Co., 226 Mo. App. 189, 192-193, 47 S.W.2d 242, 244 (1932) (emphasis in original). The title of H.C.S.H.B. 907 and 1497 indicates that the subject of this act is expense reimbursement, not compensation. Most, if not all, of the other provisions of Section 57.430.1, RSMo Supp. 1982, relate to mileage expense reimbursement. Construing the mileage reimbursement parts of the statute with the additional two hundred dollars per month provision, one is led to the conclusion that the additional two hundred dollars per month provision was intended to provide expense reimbursement.

Second, if the additional two hundred dollars per month provision is considered compensation, a problem arises in the application of this provision to sheriffs. Most, if not all, sheriffs were last elected at the general election in 1980 and took office January 1, 1981. Their four-year terms of office are ending January 1, 1985. See generally Section 57.010, RSMo 1978. Article VII, Section 13, Missouri Constitution, states:

The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended.

(Emphasis added.) This constitutional provision applies to sheriffs, see State ex rel. Selleck v. Gordon, 254 Mo. 471, 162 S.W. 629 (1914), and prohibits an increase in compensation during a sheriff's term of office, unless new or additional duties are imposed upon the office. See Mooney v. County of St. Louis, 286 S.W.2d 763 (Mo. 1956). The additional two hundred dollar per month provision does not add any new or additional duties to the office of sheriff and specifically states that the money is "for these same official duties."

Mr. Marvin W. Opie

Assuming arguendo that the additional two hundred dollars per month provision is construed as authorizing compensation, then under Article VII, Section 13, Missouri Constitution, and the Selleck case, the effective date of this provision would be January 1, 1985, for those sheriffs whose terms began prior to the enactment of H.C.S.H.B. 907 and 1497. The express language of Section 57.430.1, RSMo Supp. 1982, states that January 1, 1985, is the termination date for the additional two hundred dollars per month provision. Therefore, if one considers the provision to be compensation, then, under Article VII, Section 13, Missouri Constitution, and the Selleck case, the effective date of the provision is the same as its termination date for those sheriffs whose terms began prior to the enactment of this provision. This would be an absurd construction of this provision. To avoid this absurd result, the additional two hundred dollars per month provision should be considered mileage expense reimbursement. See Missouri Attorney General Opinion No. 31, 1961, to Fritz (concluding that increases in mileage allowances do not increase compensation within the meaning of Article VII, Section 13, Missouri Constitution).

CONCLUSION

It is the opinion of this office that the 1982 repeal and reenactment of Section 57.430.1 authorizes county courts to increase the maximum allowable amount of sheriffs' and deputies' actual mileage expense reimbursement by two hundred dollars per calendar month. The additional two hundred dollars per month provision of this statute does not authorize payment in any amount above twenty cents per mile actually driven, nor does it authorize the payment of any compensation in addition to actual mileage reimbursement.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Phillip K. Gebhardt.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

March 25, 1983

OPINION LETTER NO. 74-83

Dr. Arthur L. Mallory
Commissioner of Education
State Board of Education
Post Office Box 480
Jefferson City, Missouri 65102

FILED

74

Dear Dr. Mallory:

At your request, we have reviewed the Department's fiscal years 1984-86 Application for Federal Assistance under Title I of the Elementary and Secondary Education Act of 1965, as amended by the Education Consolidation and Improvement Act of 1981, for the provision of educational services to educationally deprived children of migratory agricultural workers and fishermen.

We have considered relevant provisions of the Elementary and Secondary Education Act of 1965, as amended by the Education Consolidation and Improvement Act of 1981, including the regulations issued thereunder, as well as Article III, Section 38(a), Missouri Constitution, and Section 161.092, RSMo 1978.

This letter constitutes our official certification that the Missouri Department of Elementary and Secondary Education has the authority under state law to perform the duties and functions of a "State educational agency" as defined in Title I of the Elementary and Secondary Education Act, [20 U.S.C. Section 244(7)], as amended by the Education Consolidation and Improvement Act, including those arising from the assurances set forth in the application.

Very truly yours,



JOHN ASHCROFT
Attorney General

CONSTITUTIONAL LAW:

HANCOCK AMENDMENT:

PROPERTY TAX:

REASSESSMENT:

TAX LEVY:

TAXATION-TAX RATE:

The words "new construction and improvements", as used in Article X, Section 22(a), Missouri Constitution, mean betterments to real property, including the creation of new structures and additions to, replacements of, or remodeling of existing structures, that occur subsequent to the last annual assessment date for such property; the county clerks and the assessor in the City of St. Louis determine when a rollback in tax rate is required by Article X, Section 22(a), Missouri Constitution.

September 22, 1983

OPINION NO. 83-83

Dr. Arthur L. Mallory
Commissioner of Education
Jefferson State Office Building
Jefferson City, Missouri 65105

FILED

83

Dear Dr. Mallory:

This official opinion is issued in response to the following questions:

1. What constitutes "new construction and improvements" as that phrase is used in Article X, Section 22(a) of the Missouri Constitution?
2. Who determines when a rollback in tax rate is required as a result of Article X, Section 22(a)?
3. On what basis is a determination made that the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year? [Emphasis in original.]

Dr. Arthur L. Mallory

Article X, Section 22(a), Missouri Constitution, states in pertinent part:

If the assessed valuation of property as finally equalized, excluding the value of new construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year, the maximum authorized current levy applied thereto in each county or other political subdivision shall be reduced to yield the same gross revenue from existing property, adjusted for changes in the general price level, as could have been collected at the existing authorized levy on the prior assessed value.

Your first question asks the meaning of the phrase "new construction and improvements", as used in the Constitution. We believe that the word **new** modifies both the word **construction** and the word **improvements**. We note that the annual assessment date of property in Missouri is January first of each year. Section 137.080, RSMo 1978. Although the annual assessment requirement has not been enforced (see, e.g., *State ex rel. Cassilly v. Riney*, 576 S.W.2d 325 (Mo. banc 1979); Section 137.750.1, RSMo Supp. 1982), we believe that, under the law, **new** construction and improvements occur subsequent to each annual assessment date.

In dealing with this question, we must utilize the accepted principle for construing constitutional provisions reaffirmed by the Supreme Court of Missouri in *Roberts v. McNary*, 636 S.W.2d 332, 335 (Mo. banc 1982). That is, the meanings to be ascribed to words used in the Hancock Amendment are the ordinary and commonly understood meanings derived from the dictionary. Turning to the dictionary, we find the following definition of the word **improvement**:

[A] permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs . . . Webster's Third New International Dictionary 1138 (unabridged edition 1981).

The word **construction** finds its root in the word **construct** which is defined in part as: "[T]o form, make, or create by combining parts or elements: . . ." Id., at 489.

Dr. Arthur L. Mallory

Thus, we conclude that the words "new construction and improvements", as used in Article X, Section 22(a), Missouri Constitution, mean betterments to real property, including the creation of new structures, and additions to, replacements of, or remodeling of existing structures, that occur subsequent to the last annual assessment date for such property.^{1/}

Your second question asks who determines when a rollback in tax rate is required as a result of Article X, Section 22(a). Although the Constitution is silent on this question, it specifically states that the levy applied in each county or other political subdivision must be reduced to keep property tax revenues at existing levels, with an adjustment for changes in the general price level permitted. Since the levy adjustment is to be made by local authorities, we believe the determination as to when a rollback is required must also be made by local authorities. Presumably, such a determination will be made in a manner similar to that required by Section 137.073.2, RSMO Supp. 1982. That is, the county clerk in the counties and the assessor of City of St. Louis will notify all taxing authorities within the relevant taxing area that a rollback is necessary on the basis of information indicating that the rollback is required by law. See Opinion No. 46-83.

Your third question asks about the basis for a determination that a rollback under Article X, Section 22(a), is necessary. As we have stated, a rollback is required when the assessed valuation of property, as finally equalized but excluding the value of new

1/^{1/}This statement does not contravene the relevant comments in the memorandum dated October 1, 1980, from the Taxpayers' Survival Association, captioned DRAFTERS' NOTES - TAX LIMITATION AMENDMENT, at page 10, to wit:

"The value of new construction and improvements" clearly means only new physical construction. Any increase in value because of zoning changes or for any other reason are not within the meaning of "new construction and improvements." New construction is intended to mean the amount of newly construction [sic] property less losses. Failure to adjust for losses would allow taxes on existing property to increase faster than inflation which is clearly contrary to the intent of this section.

Of course, the intent of the drafters is not controlling. *Boone County Court v. State*, 631 S.W.2d 321, 324 n.2 (Mo. banc 1982).

Dr. Arthur L. Mallory

construction and improvements, increases by a larger percentage than the increase in the general price level from the previous year.

Two comparisons are necessary. First, the total assessed valuation of all property in the county from the previous year must be compared to the total assessed valuation of all property for the current year, as finally equalized by the State Tax Commission excluding the value of new construction and improvements. Section 137.115, RSMo Supp. 1982, requires the assessor in all counties and the City of St. Louis to list and value all real and tangible personal property within their jurisdiction. See, Sections 137.245, 137.375, 137.515, RSMo 1978. In addition to the review by the various county boards of equalization, the State Tax Commission must annually equalize the value of property in all of the counties and the City of St. Louis. Section 138.390, RSMo 1978. Notice of the equalized values is to be provided annually to the county clerks and the assessor in the City of St. Louis. Section 138.400, RSMo 1978.

If the assessors have prepared the tax books in such a manner as to show the value attributed to new construction and improvements, if any, on each parcel, which we believe they are required to do under the terms and conditions of this constitutional provision, the total value of the current assessments in each county and in the City of St. Louis, as equalized by the State Tax Commission in the current year, less the value of new improvements and construction, can be easily compared with the total assessed value of property from the previous year, and the percentage of increase noted. It remains only to compare this percentage to the percentage increase in the general price level from the previous year.

The term "general price level" is defined in Article X, Section 17(3), Missouri Constitution, as the Consumer Price Index for All Urban Consumers for the United States as defined and officially reported by the United States Department of Labor. The Consumer Price Index for All Urban Consumers is published monthly by the Bureau of Labor Statistics, United States Department of Labor. It is an index, with 1967 as its base year (1967 = 100), which is used to measure price changes in a fixed "market basket" of goods and services. The "market basket" is designed to reflect the actual purchases of goods and services by the average urban consumer. Since the annual assessment date in Missouri is January first of each year (Section 137.080, RSMo 1978), it would appear that the percentage of increase in assessed valuation from the previous year should be compared to the percentage of change in the Consumer Price Index during the same period. The latter percentage can be obtained by comparing the index published at the beginning of the previous year to the index published at the end of the previous year. When the percentage increase of the

Dr. Arthur L. Mallory

assessed valuation is greater than the percentage increase of the general price level, a rollback of tax levies is required by Article X, Section 22(a), Missouri Constitution.

CONCLUSION

It is the opinion of this office that:

(1) The words "new construction and improvements", as used in Article X, Section 22(a), Missouri Constitution, mean betterments to real property, including the creation of new structures and additions to, replacements of, or remodeling of existing structures, that occur subsequent to the last annual assessment date for such property, and that (2) the county clerks and the assessor in the City of St. Louis determine when a rollback in tax rate is required by Article X, Section 22(a), Missouri Constitution.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

May 23, 1983

OPINION LETTER NO. 88-83

The Honorable David L. Rauch
Representative, District 121
1405 Main Street
Higginsville, Missouri 64037

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Dear Representative Rauch:

This letter is issued in response to the following question:

As used in chapter 137, RSMo, relating to the assessment and levy of property taxes, what constitutes a "brief description" of land which cannot be properly described by numerical order?

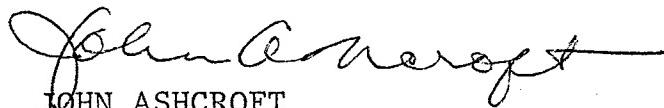
An example of the provision described in your request is contained in Section 137.215, RSMo 1978, wherein the assessor in making up the tax book is required to place all lands which cannot be properly described by numerical order at the close of the land list by briefly describing them, indicating the quantity and location thereof, along with the owner's name. The intention of the legislature in this area seems quite apparent. That is, the assessor must describe that property which cannot be identified by numerical order so that it can be identified for tax purposes.

In National Cemetery Ass'n of Missouri v. Benson, 344 Mo. 784, 129 S.W.2d 842 (1939), the Missouri Supreme Court said that a description of property "is sufficiently definite and certain if the description by its own terms will enable one reasonably skilled in such matters to locate the land." Id. at 845. As pointed out by the court therein, a valid assessment is essential to a valid tax, and where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that a particular parcel of land is being taxed, the duty of payment cannot be performed.

The Honorable David L. Rauch

We believe that the above-quoted statement from the Benson case is the best definition of a "brief description" as set forth in your request. It would serve little purpose to give examples because each situation must depend upon the facts confronting the assessor. However, the overriding purpose of such statutory provision is to require the identification of each parcel of land and that it be set apart from all others so that property taxes can be assessed and collected.

Very truly yours,



JOHN ASHCROFT
Attorney General

ANNUAL LEAVE:

COMPENSATION:

SICK LEAVE PAYMENTS AND SICK LEAVE:

STATE EMPLOYEES' RETIREMENT SYSTEM:

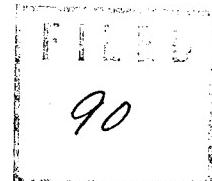
do not accumulate sick leave pursuant to Section 36.350, RSMo Supp. 1982, and 1 CSR 20-5.020(2)(B). Accordingly, the State Courts Administrator need not certify any amount of unused sick leave pursuant to Section 104.601, RSMo Supp. 1982, for such court reporters.

Officers who are compensated at specific rates pursuant to statute, e.g., official court reporters,

October 21, 1983

OPINION NO. 90-83

The Honorable Harold L. Caskey
Senator, District 31
State Capitol Building, Room 320
Jefferson City, Missouri 65101



Dear Senator Caskey:

This opinion is in response to your question asking:

Whether a court reporter who is a member of the Missouri State Employees' Retirement System is entitled to include unused accumulated sick leave to determine his length of service and consequently, should the Office of State Courts Administrator certify such unused leave to the Missouri State Employees' Retirement System?

Section 104.601, RSMo Supp. 1982, states:

Any member retiring under the provisions of chapter 104 or any member retiring under provisions of chapter 169, RSMo, who is a member of the public school retirement system and who is employed by a state agency other than an institution of higher learning, after working continuously until reaching retirement age, shall be credited with all his unused sick leave as certified by his employing agency. When calculating years of service,

The Honorable Harold L. Caskey

each member shall be entitled to one-twelfth of a year creditable service for each eighty-four days of unused accumulated sick leave earned by him. The rate of accrual of sick leave for purposes of computing years of service as this section applies to legislative, executive and judicial employees shall be consistent with the rate of accrual as specified by regulations of the personnel advisory board pursuant to section 36.350, RSMo. Nothing under this section shall allow a member to vest in the retirement system by using such credited sick leave to reach the time of vesting. [Emphasis added.]

We believe the central issue is whether official court reporters earn sick leave.^{1/}

Section 36.350, RSMo Supp. 1982, relating to sick and annual leave, states:

The regulations shall provide for the hours of work, holidays, attendance, and leaves of absence in the various classes of positions subject to this law. They shall contain provisions for annual leave, sick leave, and special leaves of absence, with or without pay, or with reduced pay, and may allow special extended leaves for employees disabled through injury or illness arising out of their employment, and the accumulation of annual leave and sick leave. Such regulations shall apply in all state agencies. [Emphasis added.]

1/

In *Hawkins v. Missouri State Employees' Retirement System*, 487 S.W.2d 580 (Mo. App. 1972), the court held that official court reporters appointed pursuant to Section 485.040, RSMo 1969 (now, RSMo 1978), are employees of the State who are employed by a department within the meaning of Section 104.310(15), RSMo 1969 (now, Section 104.310(20)(a), RSMo Supp. 1982). Therefore, official court reporters are treated as members of the Missouri State Employees' Retirement System.

In Opinion No. 20-83, Hackwood, 1983, we interpreted the words "after working continuously until reaching retirement age" in Section 104.601, RSMo Supp. 1982, to mean that an employee who works continuously until he or she is eligible to retire under Chapter 104, RSMo 1978 and Supp. 1982, may qualify for this sick leave credit.

The Honorable Harold L. Caskey

The above-emphasized language was first introduced into the law by C.C.S.H.B. 673, 1979 Mo. Laws 213, 225-226. In Opinion No. 46, Bradford, 1980, this office concluded that the emphasized language make the regulations promulgated pursuant to Section 36.350, RSMo Supp. 1979, applicable to all state agencies, except the University of Missouri. The circuit courts are state agencies, see Opinion No. 7-83, Antonio, 1983, and it would appear that such rules apply to circuit court personnel.^{2/}

1 CSR 20-5.020(2)(B) states:

Each provisional, probationary, or regular employee shall be entitled to sick leave with full pay computed at the rate of one and one-fourth (1 1/4) working days for each calendar month of service during at least fifteen (15) working days of which month such employee has been in pay status. All such leave shall be credited any time between the twentieth day of the month and the last day of the month in which it accrues. Such leave shall not be credited to employees who have ceased duty preliminary to separation from the classified service. In all cases where an employee has been absent on sick leave he shall immediately upon return to work submit a

2/

Article V, Section 4, Missouri Constitution, grants the Supreme Court of Missouri supervisory authority over all courts. Pursuant to this authority, the court has promulgated Missouri Supreme Court Administrative Rule No. 7 (hereinafter sometimes referred to as "Rule 7"). Certain sick leave rules are specified in Rule 7.01.C.4.1 & .2.

We believe that Rule 7 does not govern the sick leave benefits of official court reporters for two reasons:

First, Rule 7.01 states that the rule applies only "to the employees of the circuit court whose positions are funded by the state of Missouri pursuant to Sections 483.245 and 485.010, RSMo." Official court reporters are not paid a salary pursuant to either of those two statutes.

Second, Rule 7.01.C states that the rule describes authorized benefit and leave policies not otherwise provided by statute. Due to the 1979 amendment to Section 36.350, RSMo Supp. 1982, making the sick leave rules promulgated thereunder applicable to all state agencies, including the circuit courts, sick leave benefits for circuit court personnel are provided by statute. Therefore, the sick leave provisions of Rule 7 do not apply.

The Honorable Harold L. Caskey

statement that such absence was due to illness, disease or disability and, in cases where such absence exceeds five working days, such statement shall be in writing signed by a person legally authorized to treat persons suffering from the illness, disease or disability for which sick leave may be granted under these rules and who treated the employee during such period. For lesser periods of absence the appointing authority may, in his discretion, require such evidence of illness as he deems necessary.

We conclude, for reasons discussed below, that official court reporters are not entitled to sick leave under this rule.

The right of public officers to compensation is purely a creature of statute. Such compensation statutes are strictly construed against the public officer. See, e.g., *Becker v. St. Francois County*, 421 S.W.2d 779, 782 (Mo. 1967); *Felker v. Carpenter*, 340 S.W.2d 696, 701 (Mo. 1960); *Nodaway County v. Kidder*, 344 Mo. 795, 801, 129 S.W.2d 857, 860 (1939); *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 350 (Mo. App. 1980).

3/ The statute establishing the salary of official court reporters is Section 485.060, RSMo Supp. 1982, which states:

Each court reporter for a circuit judge shall receive an annual salary of twenty-three thousand seven hundred ninety dollars plus any salary adjustment provided by section 476.405, RSMo, payable in equal monthly installments on the certification of the judge of the court or division in whose court the reporter is employed. When paid by the state the salaries of such court reporters shall be paid in semi-monthly or monthly installments, as designated by the commissioner of administration.

Strictly construed, as Missouri appellate decisions require, this statute creates a right of compensation of a certain amount of money. Nothing is mentioned about annual or sick leave benefits. If official court reporters were entitled to compensation

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There may be other statutes providing for compensation to official court reporters, e.g., Section 485.100, RSMo 1978. We are, however, not aware of any statute specifically authorizing official court reporters to receive sick leave benefits or requiring official court reporters to work a certain number of hours per week.

The Honorable Harold L. Caskey

for annual or sick leave benefits, their compensation would improperly exceed the statutory rate specified by the General Assembly.

We also note that court reporters have irregular hours. If a court proceeding lasts late into the night, it is the recorder's duty to attend such sessions under the direction of the judge thereof. Section 485.050, RSMo 1978. Court reporters may not "quit" after putting in their "forty hours". Therefore, there is a practical difficulty in calculating sick leave entitlements for those officials who may not serve regular forty-hour-per-work weeks.

CONCLUSION

It is the opinion of this office that officers who are compensated at specific rates pursuant to statute, e.g., official court reporters, do not accumulate sick leave pursuant to Section 36.350, RSMo Supp. 1982, and 1 CSR 20-5.020(2)(B). Accordingly, the State Courts Administrator need not certify any amount of unused sick leave pursuant to Section 104.601, RSMo Supp. 1982, for such court reporters.

Very truly yours,



JOHN ASHCROFT
Attorney General

COUNTY CONTRACTS:
COUNTY COURTS:
COUNTY JAILS:
DEPARTMENT OF CORRECTIONS
AND HUMAN RESOURCES:
JAILERS:
JAILS:
PRISON:

Sheriffs may not contract out the operation of the county jails to private entities. The Department of Corrections and Human Resources may not contract out the operation of adult correctional facilities to private entities, except for the operation of halfway houses.

July 18, 1983

OPINION NO. 93-83

The Honorable Roger B. Wilson
Senator, District 19
State Capitol Building
Jefferson City, Missouri 65101

Dear Senator Wilson:

You have requested an official opinion of this office on the following question:

Does a county or state have the authority to contract for the construction or operation of a corrections facility with a private entity, including both profit and not-for-profit private entities?

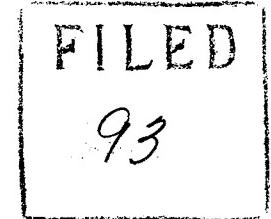
Subsequent to submission of this question, it was determined that your concern is with the authority of counties and the state to enter into service agreements with a private entity for the operation of adult correctional facilities. Accordingly, our opinion is limited to such service agreements.

I.

Counties

Section 70.220, RSMo 1978, states:

Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this state, or with other states or their municipalities or political subdivisions, or



The Honorable Roger B. Wilson

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with any private person, firm, association or corporation, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivision. If such contract or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides.

[Emphasis added.]

Counties come within the definition of the words "political subdivision" in Section 70.210(2), RSMo 1978. Therefore, counties may contract with a private entity for the operation of any public facility if the operation of said public facility is within the scope of the powers of that county.

Section 49.310, RSMo 1978, authorizes counties to acquire a site for, construct, reconstruct, remodel, repair, maintain and equip the county jails. However, the operation of county jails is conferred upon the county sheriffs. Section 221.020, RSMo 1978, states:

The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible.

This statute shows that the day-to-day operation of county jails is not vested in the county courts but is a duty of the county sheriffs. County sheriffs are not "political subdivisions" under Section 70.210(2), RSMo 1978. Therefore, Section 70.220, RSMo 1978, does not grant sheriffs authority to contract out the operation of the county jail to a private entity.

Section 221.020, RSMo 1978, does authorize the sheriff to appoint a jailer. In Opinion No. 60, Medley, 1955, copy enclosed, this office concluded that the jailer is compensated pursuant to Section 57.250, RSMo 1949, now, RSMo 1978, as are deputies and

The Honorable Roger B. Wilson

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assistants of the sheriff. It follows from this opinion that the jailer is an employee, as are the sheriffs' deputies and assistants, and not an independent contractor. Therefore, we find no authority for a sheriff to contract out the operation of the county jail to a private entity.

II.

State

The Department of Corrections and Human Resources manages adult state corrections facilities. Section 217.015.1, RSMo Supp. 1982, states:

The department of corrections and human resources shall supervise and manage all penal, correctional, training, rehabilitation and reformatory institutions, and probation and parole of the state of Missouri.

See also, Section 217.155, RSMo Supp. 1982.

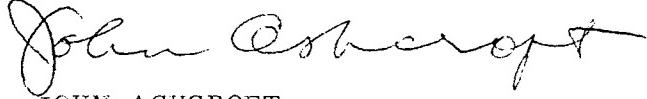
We are aware that Section 217.430.1, RSMo Supp. 1982, authorizes the department to contract with private entities for the establishment of halfway houses; however, we find no other statute authorizing departmental service contracts for the operation of correctional facilities. See, Section 217.010(4), RSMo Supp. 1982 (defining "facilities").

CONCLUSIONS

It is the opinion of this office that:

1. Sheriffs may not contract out the operation of the county jails to private entities.
2. The Department of Corrections and Human Resources may not contract out the operation of adult correctional facilities to private entities, except for the operation of halfway houses.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosure: Opinion No. 60, Medley, May 12, 1955

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

August 22, 1983

OPINION LETTER NO. 96-83

The Honorable Claire McCaskill
Representative, District 42
State Capitol Building
Jefferson City, Missouri 65101

Dear Representative McCaskill:

This opinion is written in response to the following questions:

1. Does a medical expense insurance policy or contract of a Company doing business as an insurer in Missouri which limits payments of benefits for expenses for inpatient treatment for a recognized mental illness to a maximum of \$10,000 (and has no such limitation for benefits for expenses of any other illness) violate the provisions of sub-section 2(1) of Section 376.381 of the Revised Statutes of Missouri where the reasonable and necessary hospital expenses for such treatment for thirty (30) days exceeds \$10,000?
2. Does a medical expense insurance policy or contract of such an insurance company violate the provisions of sub-section 2(2) of Section 376.381, RSMo., when it provides benefits for outpatient expenses for other medical care, but does not provide (or expressly excludes) benefits for therapeutic care and treatment expenses for a recognized mental illness as an outpatient, which therapeutic care and treatment have been prescribed by a licensed physician specializing in the

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The Honorable Claire McCaskill

treatment of mental illness, and such outpatient therapeutic care and treatment are rendered in a psychiatric hospital or residential treatment center accredited by the Joint Commission on Accreditation of Hospitals?

3. Does a medical expense insurance policy or contract of such an insurance company violate the provisions of sub-section 2(3) of Section 376.381, RSMo., when it provides benefits for outpatient expenses for other medical care, but does not provide (or expressly excludes) benefits for outpatient psychotherapy sessions for a recognized mental illness rendered by a licensed physician specializing in the treatment of a mental illness, or by a licensed psychologist?

Simply put, these three questions describe situations in which insurance policies or contracts of a company doing business as an insurer in Missouri offer benefits for mental health expenses below the minimums set forth in Section 376.381.2, RSMo Supp. 1982. Sections 376.381 and 376.382 were passed by the General Assembly in 1980 in C.C.S.H.B. 1724, 1980 Mo. Laws 503, 514.

Section 376.381 provides:

1. For purposes of sections 376.381 and 376.382, the term "recognized mental illness" shall include those conditions classified as "mental disorders" in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorders, but shall not include mental retardation.

2. After August 13, 1980, every insurance company, health services corporation and health maintenance organization doing business in Missouri shall offer to each policyholder or contract holder of a medical expense policy or contract coverage for expenses arising from psychiatric services for a recognized mental illness, which coverage shall at least meet the following minimum requirements:

- (1) In the case of policies or contracts which provide benefits for expenses as an inpatient in a general hospital, benefits for inpatient treatment for a recognized mental

The Honorable Claire McCaskill

illness shall be the same as for any other illness, except that benefits may be limited, but benefits shall be available for at least thirty days in any policy or contract benefit period;

(2) In the case of policies or contracts which provide benefits for outpatient expenses, benefits shall apply to the therapeutic care and treatment of a recognized mental illness when prescribed by a licensed physician specializing in the treatment of mental illness and rendered in a psychiatric residential treatment center accredited by the Joint Commission on Accreditation of Hospitals on either an inpatient or outpatient basis. Such benefits shall be payable within the terms of the policy or contract notwithstanding the policy or contract definition of hospital, to the extent of not less than fifty percent of the reasonable and customary charges for such services and up to a maximum benefit of one thousand five hundred dollars during each policy or contract benefit period;

(3) In the case of policies or contracts which provide benefits for outpatient expenses, such benefits shall be provided to the extent of not less than fifty percent of reasonable and customary charges for twenty psychotherapy sessions during any policy or contract benefit period for psychiatric services for a recognized mental illness rendered by a licensed physician specializing in the treatment of mental illness. Such benefits shall also apply to such services when rendered by a licensed psychologist unless specifically rejected by the group or individual policyholder or contract holder. The frequency of such psychotherapy sessions may be limited, but benefits shall be available for at least one session during any seven consecutive days.
[Emphasis in original.]

Section 376.382 provides:

1. The offer of such minimum benefits as set forth in section 376.381 shall be made to Missouri applicants for coverage with respect to all individual and group medical expense policies or contracts issued after August 13, 1980, and shall be made to existing Missouri

The Honorable Claire McCaskill

group policyholders or contract holders with respect to medical expenses policies or contracts adjusted to change rates after August 13, 1980.

2. Nothing in section 376.381 or this section shall prohibit the insurance company, health services corporation or health maintenance organization from including all or part of the minimum benefits set forth in subsection 2 of section 376.381 as standard benefits in their policies or contracts issued in Missouri.

In view of the language of these sections setting forth the minimum requirements, it would appear that the answer to all three of your questions is "yes." That is, health insurance providers cannot limit benefits for recognized mental illness in the manner stated.^{1/} Without a more thorough examination of the total relationship between the health insurance provider and the insured, a conclusive answer cannot be given.

In our opinion, Sections 376.381 and 376.382 require all health insurance providers to offer a medical expense policy or contract coverage for the treatment of recognized mental illness in conformance with at least the minimum requirements set forth in subsections (1), (2), and (3) of Section 376.381.2. However, we see nothing in these statutes which prevents the health insurance provider from offering alternative benefits of lesser value when the insured rejects the mandatory offer of the minimum benefits set forth in the statute.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Richard L. Wieler.

Very truly yours,


JOHN ASHCROFT
Attorney General

^{1/}We interpret the words "except that benefits may be limited, but benefits shall be available for at least thirty days in any policy or contract benefit period" in Section 376.381.2(1) to mean that benefits for inpatient treatment of a recognized mental illness may not be limited during the first thirty days of a policy or contract benefit period.

DEPARTMENT OF REVENUE-DIRECTOR:
PUBLIC RECORDS:
PERSONNEL:
SUNSHINE LAW:

defined in the Sunshine Law, but such records may be exempted from public disclosure or closed as required by law.

Personnel records of the Missouri Department of Revenue come within the definition of "public records" as

OPINION 97-83
AMENDED February 24, 1986

Mr. Paul S. McNeill, Jr., Director
Department of Revenue
Truman State Office Building
301 West High Street
P.O. Box 311
Jefferson City, MO 65102

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Dear Mr. McNeill:

On June 24, 1983, this office issued Opinion No. 97-83 to your predecessor, Richard A. King, concerning personnel records maintained by the Missouri Department of Revenue. Shortly thereafter, on July 8, 1983, it was necessary to issue a clarification letter to Mr. King regarding Opinion No. 97-83 because of certain misunderstanding about the scope of the opinion. In spite of this, questions continue to persist which require us to withdraw our original response and substitute the following.

The original opinion request asked the following questions:

1. Are personnel records of employees of the Missouri Department of Revenue [hereinafter sometimes referred to as "DOR"] open "public records" under . . . [Section] 610.010(4) RSMo., and, therefore, open to inspection by the general public?

2. Are any parts or portions of personnel files and records not subject to Chapter 610 RSMo., and, if so, may the Director of Revenue by rule, policy or procedure designate such parts, portions or personnel records in their entirety as confidential or otherwise unavailable for inspection by members of the general public?

The Honorable Paul S. McNeill

3. Assuming that Chapter 610 RSMo. makes personnel records of employees of the Department of Revenue "public records" and that the Department of Revenue refuses to allow inspection of such records by the general public:

a. Would the Director of Revenue or the Department of Revenue be subject to the remedies and penalties found in [Section] 610.027 RSMo.?

b. Would there be personal liability against the Director of Revenue for such refusal to allow inspection?

4. Assuming that Chapter 610 RSMo. makes personnel records of the Department of Revenue in part or in their entirety "public records" and the Department of Revenue allows inspection of such records by the general public:

a. Would the Department of Revenue or the Director of Revenue be subject to liability or suit by employees of the Department of Revenue for such release of personnel information under state or federal law?

b. Would there be the potential for personal liability against the Director of Revenue for such release of information? [Emphasis in original.]

The personnel records described in the opinion request are said to contain "personal histories, employment applications, letters of reference, performance evaluations, examinations and employee disciplinary actions such as letters of reprimand and dismissals. Other information such as service reports containing evidence of past criminal or police records, driving records and tax history may also be included."

There is no question that the Sunshine Law or the Open Meetings Act, Sections 610.010 to 610.120, RSMo 1978, Supp. 1984, and Supp. 1985, was enacted by the legislature to guarantee the public's right of access to and knowledge of the activities of its governing bodies. Section

The Honorable Paul S. McNeill

610.010(4), RSMO 1984 Supp., defines the term "public record" in pertinent part as any record retained by or of any public governmental body. Section 610.015, RSMO 1978, generally provides that public records are open to the public for inspection and duplication, unless "otherwise provided by law." In the absence of such law, personnel records would be considered public records.

However, as discussed in our Opinion 119-1984, copy enclosed, the phrase "otherwise provided by law" has been interpreted to require the closure of records where disclosure would violate the right of privacy. See, Hyde v. City of Columbia, 637 S.W.2d 251 (Mo.App. 1982). Moreover, the legislature took certain additional steps to balance the right of the public to know with the necessity of restraint in certain matters in Section 610.025, RSMO 1985 Supp., which enumerates various areas in which meetings, records, or votes may be closed under the Sunshine Law. Subsection 3 of Section 610.025, RSMO 1985 Supp., states that "meetings relating to the hiring, firing, disciplining, or promotion of personnel of a public governmental body" may be closed. The Missouri Court of Appeals in Wilson v. McNeal, 575 S.W.2d 802, 810 (Mo.App. 1978), has rejected a narrow interpretation of the term "meetings" as used in this subsection by holding that records from a closed meeting as well as the meeting itself might be closed.

The personnel records mentioned in the request are vital ingredients in any discussion of hiring, firing, disciplining, or promotion. Since the Director of Revenue is the public governmental body in this instance because of his authority over Department of Revenue employees granted pursuant to Section 32.050.3(2), RSMO 1978, and Subsection 12 of the Omnibus State Reorganization Act of 1974, Appendix B, RSMO 1978, he is vested with the authority to determine Department of Revenue policy on this matter. The recognition by the legislature that such matters could be handled by the head of the public governmental body who was solely responsible for decision making provides convincing evidence that all individual personnel records maintained for the purpose of hiring, firing, disciplining, or promotion may be closed without meeting in order to protect the privacy of the individual and to permit the necessary collection of information by the public governmental body.

We believe this discussion as to your first question provides an answer to the second question. As stated, the Director of Revenue is vested with the authority and duty

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of determining Department of Revenue policy on the hiring, firing, disciplining, or promotion of personnel and may establish policy to close personnel records to the extent necessary to protect specific individual records within the context of the Sunshine Law.

The remaining questions inquire as to the liability of the Director of Revenue for actions taken with regard to personnel records. Because this office defends the State of Missouri and the Director of Revenue for acts done in his official capacity, we believe it is not in the best interest of the State of Missouri, the Department of Revenue, or the Director of Revenue to discuss theories of liability in this opinion and thereby potentially compromise our ability to provide a defense. We would be pleased to consult with you on an informal basis in this regard.

CONCLUSION

It is the opinion of this office that personnel records retained by or the property of the Missouri Department of Revenue come within the definition of "public records" as defined in the Sunshine Law, but that such records may be exempted from public disclosure or closed as required by law.

Very truly yours,



WILLIAM L. WEBSTER
Attorney General

COMMUNITY MENTAL HEALTH CENTERS:

COUNTIES:

COUNTY FUNDS:

COUNTY MENTAL HEALTH CLINIC:

MENTAL HEALTH CLINIC:

A county treasurer is the custodian of a single county community mental health fund created or maintained pursuant to Section 205.980.2, RSMo 1978.

The governing body of the county must issue warrants on such community mental health fund when presented with a voucher issued by the relevant community mental health fund board of trustees, unless (1) the voucher is not properly authenticated by the board or (2) the voucher shows on its face that it is issued for purposes other than those specified in Section 205.977, RSMo 1978.

August 16, 1983

OPINION NO. 99-83

The Honorable Gary C. Lentz
Newton County Prosecuting Attorney
Newton County Courthouse
Neosho, Missouri 64850

Dear Mr. Lentz:

This is in response to your request for an official opinion of this office on the following question:

Pursuant to the provisions of Section 205.975, RSMo 1978, et. seq., is the Board of Trustees of the Newton County Community Mental Health Fund allowed to collect, receive, hold and expend mental health fund monies or is the Newton County Treasurer required to act as custodian of the Newton County Community Mental Health Fund and make payments from this fund only on warrants issued by the Newton County Court as required by Section 54.100 and 54.140, RSMo 1978?

We understand that the Newton County Court has not entered into a cooperative agreement with any other county in the relevant catchment area pursuant to Section 205.982, RSMo 1978,^{1/} for the provision of mental health services.

1/

All statutory references are to RSMo 1978, unless otherwise indicated.



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Section 205.980.1 authorizes the governing body of a county to levy and collect a property tax not to exceed thirty cents per one hundred dollars of assessed valuation under certain conditions for the purposes set out in Section 205.977, which states:

Any county which has one or more catchment areas within its boundaries or which is within the boundaries of a catchment area may, by a majority vote of the qualified voters voting thereon, levy and collect a tax to accomplish any of the following purposes:

(1) Providing necessary funds to establish, operate, and maintain community mental health centers, mental health clinics, or any comprehensive mental health services;

(2) Providing funds to supplement existing funds for the operation and maintenance of community mental health centers, mental health clinics, or any comprehensive mental health services;

(3) Purchasing any of the comprehensive mental health services from community mental health centers, mental health clinics, and other public facilities or not for profit corporations which are designated by the department.

Section 205.980.2 states:

The tax so levied shall be collected along with other county taxes in the manner provided by law. All funds collected for this purpose shall be deposited in a special fund to be designated "Community Mental Health Fund" to accomplish the purposes as set out in section 205.977 and shall be used for no other purpose. Deposits in the fund shall be expended only upon approval of the board of trustees.

This office concludes that the Newton County Treasurer acts as custodian of the Newton County Community Mental Health Fund for the following reasons:

First, there is no statutory provision authorizing or regulating the appointment of a treasurer for a community mental health fund board of trustees (hereinafter sometimes referred to as "board treasurer"). The only statutory mention of a board treasurer is in Section 205.983 which applies only to instances where

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two or more counties have entered into a cooperative agreement pursuant to Section 205.982. It is our understanding that this provision does not apply to the Newton County Community Mental Health Fund.

Second, there is no bonding provision for "single county" board treasurers. Again, the only bonding provision applicable to a board treasurer is contained in Section 205.983.3. This bonding provision applies to community mental health funds used to finance community mental health services that are provided for in joint cooperation agreements. It is our understanding that this provision does not apply to the Newton County Community Mental Health Fund.

Third, Section 205.980.2 provides that the community mental health tax "shall be collected along with other county taxes in the manner provided by law. . . ." We believe the community mental health tax is a county tax; it is levied by the governing body of the county only after approval by a majority vote in a county-wide election. Sections 205.977 to 205.980. In the absence of a contrary statutory directive, we believe Section 139.210.1 applies, which requires the county collector to pay collected county taxes into the county treasury.

Having concluded that the county treasurers have custody of "single county" community mental health funds, we believe the laws applicable to county treasurers apply, and, ergo, warrants must be issued by the relevant county court or county governing body before money in this fund is to be disbursed. Section 54.100 states in part: "He [the county treasurer] shall receive all moneys payable into the county treasury, and disburse the same on warrants drawn by order of the county court."

Section 54.140 states:

It shall be the duty of the county treasurer to separate and divide the revenues of such county in his hands and as they come into his hands in compliance with the provision of law; and it shall be his duty to pay out the revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund which several funds shall be known and designated as provided by law; and no warrant shall be paid out of any fund other than that upon which it has been drawn by order of the court as aforesaid. Any county treasurer or other county officer, who shall fail or refuse to perform the duties required

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of him or them under the provisions of this section and chapters 136 to 154, RSMo, and in the express manner provided and directed, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, and not more than five hundred dollars, and in addition to such punishment, his office shall become vacant. [Emphasis added.]

This does not mean that the relevant county court or county governing body has unfettered discretion to refuse to issue a warrant on a community mental health fund when presented with a voucher issued by the relevant board of trustees of a community mental health fund. Section 205.986 states:

The board of trustees appointed by a county or a combination of counties shall have the following powers and responsibilities to administratively control and manage the community mental health fund to accomplish the purposes as set out in sections 205.977 and 205.982:

(1) In the case of a community mental health center, mental health clinic, or any comprehensive mental health service established by a county or combination of counties, the center, clinic, or service shall be under the administrative control and management of the board of trustees which shall be the governing board which may employ necessary personnel, fix their compensation, and provide quarters and equipment for the operation with funds from federal, state, county, and city governments available for that purpose and which shall take steps as it deems necessary to secure private and public funds to help support the centers, clinics, or services.

(2) In the case of a county or combination of counties providing funds to supplement existing funds or purchase services from an existing community mental health center, mental health clinic, or other public facility or not for profit corporation as designated by the department, the board of trustees shall administer and disburse the community mental health fund for the provision of any comprehensive mental health services.

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(3) The board of trustees has the authority to contract with existing public facilities or not for profit corporations to provide services for the residents of the county or the catchment area to be served.

(4) The board of trustees shall submit information as required on the disbursement of moneys from the community mental health fund set up to accomplish the purposes as set out in sections 205.977 and 205.982 to the department by such date as it specifies in order to facilitate annual preparation of regional and state plans. [Emphasis added.]

Section 205.980.2 states in part: "Deposits in the fund shall be expended only upon approval of the board of trustees."

The situation is similar to that considered in *State ex rel. Holman v. Trimble*, 316 Mo. 1041, 293 S.W. 98 (banc 1927), which dealt with the construction of county hospital statutes prior to the enactment of H.B. 1069, 1982 Mo. Laws 374. Among other things, H.B. 1069 authorizes the appointment of treasurers for county hospital boards of trustees.

The court in *Trimble*, 316 Mo. at 1047-1048, 293 S.W. at 101, stated:

The Court of Appeals construed these statutes to mean that hospital trustees have exclusive control of the expenditure of moneys collected to the credit of the hospital fund. The natural interpretation of that language excludes the intervention of any other official in determining what claims are to be paid and what accounts ought to be allowed. The plain words mean that full discretion is vested in the hospital board to pass upon and determine the validity of every claim presented. Relators call attention to the provision that the money must be deposited in the treasury of the county and must be paid out only upon warrants drawn by the county court, and argue that the county court is thus vested with some discretion, some function to determine whether or not the claims presented are valid, but that same sentence of the statute goes on to say that such payments are made upon properly authenticated vouchers of the hospital board. That seems to leave no doubt that the only judgment exercised by the county court is to determine whether the vouchers

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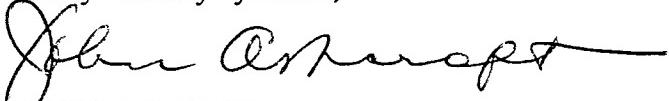
presented show proper authentication of the hospital board, and whether they are for purposes within control of the hospital board and for the purposes of the above statute. If such vouchers should show on their faces that they were issued for purposes foreign to the field controlled by the hospital board, the county court could deny warrants. [Emphasis added.]

Following the principles of the Trimble case, a county court may refuse to issue a warrant on a community mental health fund only (1) upon the ground that vouchers have not been properly authenticated by the relevant board of trustees or (2) upon the ground that the vouchers show on their face that they were issued for purposes other than those specified in Section 205.977.

CONCLUSION

It is the opinion of this office that a county treasurer is the custodian of a single county community mental health fund created and maintained pursuant to Section 205.980.2, RSMo 1978. The governing body of the county must issue warrants on such community mental health funds when presented with a voucher issued by the relevant community mental health fund board of trustees, unless (1) the voucher is not properly authenticated by the board or (2) the voucher shows on its face that it is issued for purposes other than those specified in Section 205.977, RSMo 1978.

Very truly yours,



JOHN ASHCROFT
Attorney General

TEACHERS AND TEACHERS RETIREMENT:
TEACHERS TENURE:

The word "qualified" as used in Section 168.124(1), RSMo 1978,

refers to teaching positions that permanent teachers are certified to teach and are otherwise capable of holding.

November 28, 1983

OPINION NO. 101-83

Dr. Arthur L. Mallory
Commissioner of Education
Jefferson State Office Building
Jefferson City, Missouri 65105

101

Dear Dr. Mallory:

This opinion is in response to your question and statement as follows:

Section 168.124, RSMo 1978, states:

"The board of education of a school district may place on leave of absence as many teachers as may be necessary because of a decrease in pupil enrollment, school district reorganization or the financial condition of the school district. In placing teachers on leave, the board of education shall be governed by the following provisions:

(1) No permanent teacher shall be placed on leave of absence while probationary teachers are retained in positions for which a permanent teacher is qualified;

(2) Permanent teachers shall be retained on the basis of merit within the field of specialization;

(3) Permanent teachers shall be reinstated to the positions from which they have been given leaves of absence, or if not available, to positions requiring like training and experience, or to other positions in the school system for which they are qualified by training and experience;

Dr. Arthur L. Mallory

(4) No appointment of new teachers shall be made while there are available permanent teachers on unrequested leave of absence who are properly qualified to fill such vacancies;

(5) A teacher placed on leave of absence may engage in teaching or another occupation during the period of such leave;

(6) The leave of absence shall not impair the tenure of a teacher;

(7) The leave of absence shall continue for a period of not more than three years unless extended by the board."

Does the term "qualified" as used in Section 168.124, RSMo 1978, mean "certificated" or can the local board of education take into account other factors such as recent teaching experience or demonstrated proficiency in the situation involving involuntary leave of absence?

For example: A tenured teacher is in a position that is to be eliminated because of a decrease in student enrollment. The teacher has a certificate which would legally allow him to teach in a position presently held by a probationary teacher. The tenured teacher has never taught in that field and the certificate was granted twenty years ago. The probationary teacher is doing an outstanding job in the position. Must the local board of education place the probationary teacher on involuntary leave in order for the tenured teacher to have a job?

We limit this opinion to the hypothetical facts presented above, and, specifically, we do not deal with whether a teacher with a temporary teaching certificate is "qualified" for purposes of Section 168.124(1), RSMo 1978.^{1/} We assume that the tenured teacher in the hypothetical is physically, mentally, and otherwise capable of holding the probationary teacher's job.

1/

All statutory references are to RSMo 1978, unless otherwise indicated.

Section 168.124 is a provision of the Teacher Tenure Act (hereinafter sometimes referred to as the "Act"), Sections 168.102 to 168.130, which became effective July 1, 1970. The purpose of the Act has been variously stated. *Hirbe v. Hazelwood School District*, 532 S.W.2d 848, 850 (Mo. App. 1976) declared: "One of the purposes of a teacher tenure law is to protect competent and qualified teachers in the security of their positions." (Emphasis added.) *Stewart v. Board of Education of Ritenour Consolidated School District R-3*, 574 S.W.2d 471, 473 (Mo. App. 1979), on appeal after remand, 630 S.W.2d 130 (Mo. App. 1982) stated: "A purpose of the Act is to obtain stability and permanence of employment of teachers after successful completion of a probationary period." (Emphasis added.) In *Lopez v. Vance*, 509 S.W.2d 197, 202 (Mo. App. 1974), the court stated:

We believe the purpose of our statute, as well as teacher tenure acts, was to attain stability, certainty and permanence of employment on the part of those who have shown by educational attainment and by a probationary period their fitness for the important profession of teaching. [Emphasis added.]

The judiciary has also indicated that Section 168.124, RSMo 1969 (now, RSMo 1978), evidences a preference for retaining permanent teachers over probationary teachers in making furloughing decisions. *Frimel v. Humphrey*, 555 S.W.2d 350, 353 (Mo. App. 1977).

The primary rule of statutory construction is to ascertain the intent of the lawmakers and to give effect to that intent if possible. *State v. Kraus*, 530 S.W.2d 684, 685 (Mo. banc 1975). By construing Section 168.124 with (1) the Act's purpose of providing job security to permanent teachers and (2) the preference for retaining permanent teachers over probationary teachers in making furloughing decisions, evidenced by Section 168.124, we are led to the conclusion that the word "qualified", as used in Section 168.124(1), refers to teaching positions that permanent teachers are certified to teach and are otherwise capable of holding. See Opinion Letter No. 165, Bild, 1979 (concluding that the term "field of specialization" in Section 168.124(2) refers to those courses teachers are certified to teach), copy enclosed. Accordingly, under the hypothetical facts presented, the local school board must place the probationary teacher on involuntary leave in favor of retaining the permanent teacher who is qualified to teach the subject area, irrespective of the permanent teacher's experience in the subject area or relative ability to teach in that subject area, as defined by evaluation.

Dr. Arthur L. Mallory

CONCLUSION

It is the opinion of this office that the word "qualified" as used in Section 168.124(1), RSMo 1978, refers to teaching positions that permanent teachers are certified to teach and are otherwise capable of holding.

Very truly yours,

John Ashcroft
JOHN ASHCROFT
Attorney General

Enclosure: Opinion Letter No. 165, Bild, 1979

AMENDMENT OF STATUTES:
COMPETITIVE BIDDING:
STATE CANCER HOSPITAL:
STATE PURCHASES:
PURCHASING AGENT:

Direct purchases by the
Ellis Fischel State Cancer
Center are not subject to
Chapter 34, RSMo.

September 14, 1983

OPINION NO. 102-83

Joe D. Holt, Chairman
Missouri State Cancer Commission
413 Court Street
Fulton, Missouri 65251

FILED
102

Dear Mr. Holt:

You have requested an official opinion of this office on the following questions:

Must the Ellis Fischel State Cancer Center, established under Chapter 200, RSMo Supp. 1982, competitively bid pursuant to the terms of Chapter 34, RSMo a contract for cancer treatment, cancer research, or cancer medical education when it wishes to contract with the institution with which it is affiliated pursuant to the terms of . . . [Section] 200.081, RSMo Supp. 1982 or may it enter such contracts directly with the affiliated institution without a competitive bid when the affiliation agreement which created the affiliation permits and requires subserving contracts having the purpose of promoting a coordinated approach to cancer treatment, research, and medical education?

If the answer to the above question is yes, would it be sufficient to state in the affiliation agreement that the affiliated institution is the official research arm of the Cancer Center and shall be eligible for direct contractual agreements for the purpose of conducting research or other projects?

Joe D. Holt, Chairman

Section 34.030, RSMo 1978,^{1/} states:

The commissioner of administration shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The commissioner of administration shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state. [Emphasis added.]

Section 34.040 requires purchases to be based on competitive bids.

Section 200.071, as enacted by Senate Committee Substitute for House Bill No. 549 (First Regular Session, 82nd General Assembly) (hereinafter sometimes referred to as "H.B. 549"), states:

The state cancer center shall be exempt from all provisions of chapter 34, RSMo. The state cancer commission shall establish procurement and purchasing procedures for the center which assures [sic] that all purchases are at reasonable prices and that competitive procurement practices are followed, except that purchases may be made without compliance with competitive practices in cases where patient well-being would be prejudiced by delay. . . . Provided, however, that the state cancer center shall be entitled to use the purchasing provisions of chapter 34, RSMo, and the offices of the office of administration and division of purchasing for any purchase where the state cancer center deems it advantageous. [Emphasis added.]

The plain meaning of the "except as in this chapter otherwise provided" language in Section 34.030 is that all exceptions to the State Purchasing Law are to be codified in Chapter 34, RSMo.^{2/}

^{1/}All statutory references are to RSMo 1978, unless otherwise indicated.

^{2/}Section 34.030 originated as Section 2 of S.B. 192, 1933 Mo. Laws 410, 411. Section 2 of S.B. 192 uses the words "except as in this Act otherwise provided." Substantially the same wording was used in the reenactment of this law located at S.C.S.S.B. 297, 1945 Mo. Laws 1428 (Section 64). The first use of the word "chapter" instead of the word "act" by the Revisor of Statutes

Joe D. Holt, Chairman

Thus, the issue central to the resolution of your request is whether H.B. 549 is effective as an amendment to Section 34.030 for purposes of the Ellis Fischel State Cancer Center.

Generally, when a law is amended, the amendment is set forth in full as if it were an original act. See, Article III, Section 28, Missouri Constitution. H.B. 549 does not expressly provide for the repeal and reenactment of Section 34.030. Amendments by implication, however, are not prohibited. *State ex rel. Maguire v. Draper*, 47 Mo. 29, 32 (1870); *Shott v. Continental Auto Insurance Underwriters*, 31 S.W.2d 7 (Mo. 1930); *Dorres Motor Car Co. v. Colburn*, 270 S.W. 339 (Mo. banc 1925).

As stated in 1A Sutherland, *Statutes and Statutory Construction*, Section 22.13 (C. Sands, 4th ed. 1972) (footnotes omitted):

An implied amendment is an act which purports to be independent of, but which in substance alters, modifies, or adds to a prior act. To be effective, an amendment of a prior act ordinarily must be express. Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together. [Emphasis added.]

It is our opinion that Section 34.030 and Section 200.071, H.B. 549, are inconsistent and cannot be harmonized. Therefore, because H.B. 549 clearly considers Chapter 34 in its express language, it is our opinion that H.B. 549 carves an exception to Chapter 34 and that the State Cancer Center is exempt from the provisions of Section 34.030.

The rules of statutory construction compel this result. When one statute deals with a subject in a general manner (Chapter 34) and another, later enacted statute deals with the same subject in a specific way (H.B. 549), the specific statute is deemed an exception or qualification to the general statute. *City of Raytown v. Danforth*, 560 S.W.2d 846 (Mo. banc 1977); *State v. Bey*, 599 S.W.2d 243 (Mo. App. 1980); *Dover v. Stanley*, 652 S.W.2d 258 (Mo. App. 1983).

(footnote continued from previous page)
appears to be codified at Section 14590, RSMo 1939.

Joe D. Holt, Chairman

Section 200.071, H.B. 549, states in part: "The state cancer commission shall establish procurement and purchasing procedures for the cancer center which assures [sic] that all purchases are at reasonable prices and that competitive procurement practices are followed, . . ." [Emphasis added.] The words "all purchases" in Section 200.071, H.B. 549, are not defined by the General Assembly. In construing the words "[a]ll contracts and purchases" in predecessors of the county purchasing statute, Section 50.660, RSMo Supp. 1982, the courts have indicated that competitive bidding should not be required where the contract in question is outside the competitive field or is not competitive by nature.

In *Layne-Western Co. v. Buchanan County*, 85 F.2d 343, 346-347 (8th Cir. 1936), the court stated:

The requirement of competitive bidding is always subject to the qualification that the contract must be naturally competitive. A contract for professional services does not for that reason come within the requirements of such a statute. . . . [citation omitted]. The same is true of a contract which is of such character that the contractor is the only person who can enter into it. . . .

In our Opinion Letter 22, Muckler, 1980, we interpreted Chapter 34 to require competitive bidding for professional services other than physicians, attorneys and expert witnesses. This opinion recognized a clearly articulated policy of the General Assembly to require competitive bidding prior to an award of a state contract except in the most unusual circumstances.

Section 200.081, RSMo Supp. 1982, states:

The state cancer center may establish affiliation agreements between the center, other institutions, and research facilities for promoting a coordinated approach to cancer treatment, research, and medical education.

Affiliation agreements for cancer treatment, cancer research, and cancer medical education establish an ongoing, coordinated relationship between the contracting institutions and provide for the exchange of professional, physician-related services. Such agreements are not of a competitive nature, necessarily involve the services of physicians and are not subject to competitive bid pursuant to Section 200.071, H.B. 549.

Joe D. Holt, Chairman

In answer to your second question, we believe that there must be an affirmative finding by the Commission that the subject of contracts entered pursuant to an affiliation agreement are of a noncompetitive nature; such language must be incorporated into the such contracts. Our rationale is simple: Direct purchases for noncompetitive, physician-related services are a limited exception to the General Assembly's general rule that the Cancer Center engage in competitive bidding. The exception should be invoked only after a clear finding by the Commission that the subject matter of the contract is unequivocally noncompetitive and physician-related.

CONCLUSION

It is the opinion of this office that direct purchases by the Ellis Fischel State Cancer Center are not subject to Chapter 34, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my assistants, Phillip K. Gebhardt and William Cornwell.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

June 14, 1983

OPINION LETTER NO. 106-83

Mr. Robert J. Seek
Prosecuting Attorney
Courthouse Annex
Tuscumbia, Missouri 65082

FILED

106

Dear Mr. Seek:

This letter is in response to your questions asking:

Under Sections 50.370 and 50.480, RSMo, when is the Sheriff required to pay over to the Treasurer or other official and report the following types of moneys collected by his office?

- a. Prosecuting Attorney Training Fund
- b. Law Officers Training Fund
- c. Process Servers Fees
- d. Fines
- e. Prosecuting Attorney's Fees

We believe it is necessary to examine statutes other than those to which you have referred us in answering your question, therefore:

A. With regard to prosecuting attorney training fees, the relevant statute is Section 56.765.2, RSMo Supp. 1982:

Fifty cents of every dollar collected under the provisions of subsection 1 of this section shall be at least monthly paid by the clerk of the court wherein the costs are collected to the county treasurer who shall credit the same to the "Prosecuting Attorneys Training Fund", which is hereby established. . . .
[Emphasis added.]

Mr. Robert J. Seek

The plain language of the statute provides that the clerk of the court is to pay any fees collected under this section to the county treasurer. Although we find no legal authority for the sheriff to have monies due the Prosecuting Attorney Training Fund, should the sheriff have any of these funds, we believe he should turn them over promptly to the clerk of the court for appropriate monthly distribution.

B. With regard to the law officers' training fund, Section 590.140.1, RSMo 1978, is relevant. Such section provides in pertinent part:

Such fees shall be collected by the official of each respective court responsible for collecting court costs and fines and shall be transmitted monthly to the treasurer of the county where the violation occurred in the case of violations of the general criminal laws of the state or county ordinances and to the treasurer of the municipality where the violation occurred in the case of violations of municipal ordinances.

It is our opinion that the official collecting these funds must pay them over monthly to the appropriate treasurer.

C. We assume your third question refers to process servers fees, under Section 57.280, RSMo Supp. 1982. Such section provides in pertinent part:

The sheriff upon the collection of the fees herein provided for shall pay into the treasury of the county any and all fees collected under the provisions of this section.
[Emphasis added.]

Such fees must be paid to the county treasury upon collection.

D. With regard to fines, Section 57.130, RSMo 1978, provides:

The sheriffs of the several counties shall collect and account for all the fines, penalties, forfeitures and other sums of money, by whatever name designated, accruing to the state or any county by virtue of any order, judgment or decree of a court of record, provided that by court rule provision may be made for a court

Mr. Robert J. Seek

clerk to collect fines, penalties, forfeitures and other sums of money accruing to the state by virtue of any order, judgment or decree of the court.

Our research reveals no statute stating when the officer collecting these funds must disburse them. You have suggested that Section 50.480, RSMo 1978, applies. Section 50.480 cannot be read apart from Sections 50.470, 50.490 and 50.500, RSMo 1978. We note that Section 50.470 provides that the collecting officer shall list "the name of the person entitled thereto." Section 50.480 describes the officer's duty to pay over to the treasurer "all fees in their hands belonging to others." [Emphasis added.] Section 50.490 requires the treasurer to pay out such fees "to the proper owners as the same may be called for or demanded." [Emphasis added.] Finally, Section 50.500 obligates the treasurer to turn over such fees to the general revenue fund of the county if, after one year, the fees are "uncalled for or demanded by the proper owner or legally authorized agent."

When these sections are read together, they establish a definitive procedure for the handling of fees collected from the time of their collection until ultimate disbursement. It is not necessary to determine the fees to which these sections apply herein, since, in our view, Sections 50.470 to 50.500 are not applicable to fines collected by sheriffs. As you are no doubt aware, fines collected for a breach of the penal laws of the state are payable to school districts pursuant to Article IX, Section 7, Missouri Constitution. Such monies may not be "called for or demanded", nor may they be paid over into the county general revenue fund if not called for or demanded.

As a public trustee, we believe that the sheriff collecting such fines should act with reasonable prudence. We recommend and believe the law intends that collected fines be promptly paid over to the county treasury.

E. Finally, with regard to prosecuting attorney's fees, Section 56.340, RSMo 1978, provides in pertinent part:

The prosecuting attorney, in counties of the second, third and fourth classes, shall charge upon behalf of the county every fee that accrues in his office and receive the same, and at the end of each month, pay over to the county treasury all moneys collected by him as fees, . . . [Emphasis added.]

Mr. Robert J. Seek

We believe that the prosecuting attorney is responsible for the collection and monthly payment of these fees to the county treasury. Should the sheriff have any of these fees, he should promptly pay them to the prosecuting attorney.

Very truly yours,

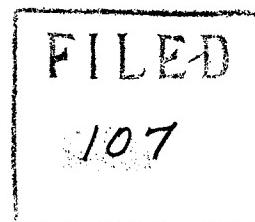

JOHN ASHCROFT
Attorney General

Board of Public Buildings
Bonds

The Board of Public Buildings has the authority pursuant to the provisions of Section 8.430, RSMo 1978, to issue refunding bonds in advance of the redemption call or maturity of the outstanding bonds to be refunded without further legislative authorization. The issuance of refunding bonds will not create an additional obligation of the Board for purposes of calculating the \$100,000,000 limitation on bonds of the Board imposed by Section 8.430. Refunding bonds may bear a rate of interest not to exceed fifteen percent pursuant to the provisions of Section 8.430 and shall have such terms and shall be sold in the manner provided by Sections 8.420, RSMo Supp. 1982, and 8.430.

June 6, 1983

OPINION NO. 107-83



Honorable Christopher S. Bond
Governor of the State of Missouri
Governor's Office
Capitol Building
Jefferson City, Missouri 65102

Dear Governor Bond:

You have requested an opinion involving legal questions arising out of a proposal presently under consideration for the advance refunding of \$43,445,000 State Office Building Special Obligation Bonds, Series A 1981 (the "Outstanding Bonds") of the Board of Public Buildings of the State of Missouri (the "Board"). Interest rates presently available to the Board make it desirable to implement an advance refunding plan at this time. Based on current interest rates, implementation of an advance refunding could result in substantial savings to the Board over the life of the bond issue.

Advance refunding is a financial tool by which the Board may substitute a new bond issue (the "Refunding Bonds") for the Outstanding Bonds in advance of the first call date. The proceeds from the sale of the Refunding Bonds, together

Governor Christopher S. Bond

with other available moneys, would be used to purchase government securities to be deposited in an escrow account. The principal of and the interest earned on the government securities would be used to meet all payments of principal and interest on the Outstanding Bonds when due. The Refunding Bonds would be secured by the revenues presently pledged to the payment of the Outstanding Bonds. Under the advance refunding proposal presently being considered, the Board could save approximately \$750,000 in interest cost over the life of the Outstanding Bonds.

You have asked for a legal opinion on several questions regarding the authority of the Board to issue refunding bonds and the statutory restrictions imposed on the issuance and terms of such bonds.

Section 8.430, RSMo 1978, authorizes the Board to issue refunding bonds. This section provides in part:

1. The revenue bonds issued pursuant to the provisions of sections 8.370 to 8.450 may be refunded, in whole or in part, in any of the following circumstances:

(1) When any such bonds have by their terms become due and payable and there are not sufficient funds in the interest and sinking fund provided for their payment to pay such bonds and the interest thereon;

(2) When any such bonds are by their terms callable for payment and redemption in advance of their date of maturity and are duly called for payment and redemption;

(3) When any such bonds are voluntarily surrendered by the holder or holders thereof for exchange for refunding bonds.

2. For the purpose of refunding any bonds issued hereunder, including refunding bonds, the board may make and issue refunding bonds in the amount necessary to pay off and redeem the bonds to be refunded together with unpaid and past due interest thereon

Governor Christopher S. Bond

and any premium which may be due under the terms of the bonds, together also with the cost of issuing the refunding bonds, and may sell the same in like manner as is herein provided for the sale of revenue bonds, and with the proceeds thereof pay off, redeem and cancel the old bonds and coupons that have matured, or the bonds that have been called for payment and redemption, together with the past due interest and the premium, if any, due thereon, or the bonds may be issued and delivered in exchange for a like par value amount of bonds to refund which the refunding bonds were issued. (Emphasis added.)

It is clear that the Board has statutory authority to issue refunding bonds. The question presented under the statute is whether the Board has authority to issue advance refunding bonds, that is bonds issued in advance of the redemption call or maturity of the outstanding bonds. Under the proposed advance refunding, the Refunding Bonds would be issued 10 years in advance of the redemption call or maturity of the Outstanding Bonds.

There are no cases or opinions of the Attorney General which address the question of authority to issue advance refunding bonds pursuant to Section 8.430. However, the Missouri courts have analyzed the status of advance refunding bonds under Missouri law. The leading case in this area is State ex rel. St. Charles County v. Smith, 152 S.W.2d 1 (Mo. 1941). This case involved an issue of toll bridge revenue refunding bonds. The refunding bonds were to be issued two months prior to the call date for the outstanding bonds to be redeemed. During the two month period, the proceeds from the sale of the refunding bonds were to be held by a bank exclusively for the purpose of paying off the outstanding bonds on the call date. The court in the Smith case concluded that it was impractical to provide for cancellation of the outstanding bonds simultaneously with the issuance of the refunding bonds and further stated:

All this should be done as expeditiously as circumstances will permit but the fact that there is a reasonable lapse between the maturity of the outstanding bonds and the issue of the refunding bonds in no sense increases the indebtedness or makes outstanding both sets of bonds at the same time.' Id.
at 7.

Governor Christopher S. Bond

The Smith court concluded that the issuance of refunding bonds did not create a new obligation or indebtedness, but rather the refunding bonds were a substitute obligation for the outstanding bonds. The outstanding bonds were deemed satisfied or defeased by the establishment of a pledged escrow account as they became due. The Smith case also reflects a public policy of Missouri in favor of refunding bonds. This policy is based on the benefit to the public and to the tax-payers from the issuance of refunding bonds resulting from interest cost savings or the release of the issuer from restrictive covenants on the outstanding bonds.

Although the issue of statutory construction here presented has never been addressed by the courts, we have addressed a similar question in the context of another refunding statute. In Opinion No. 204, Keyes, 1977, we construed the provisions of Section 108.140, RSMO 1969, which authorizes political subdivisions to issue refunding bonds. That statute provides authority to political subdivisions to:

[R]efund, extend, and unify the whole or part of their valid bonded indebtedness, or judgment indebtedness, and for such purpose may issue, negotiate, sell and deliver refunding bonds and with the proceeds therefrom pay off, redeem and cancel the bonds to be refunded as the same mature or are called for redemption
.... (Emphasis added.)

The question presented under this statute is similar to the question presented by the proposed advance refunding, that is, is there sufficient statutory authority to issue refunding bonds in advance of the maturity or call of the outstanding bonds. The language of Section 108.140, like that of Section 8.430, authorizes the issuance of refunding bonds to "pay off, redeem and cancel outstanding bonds" as the same mature. We determined that the language of Section 108.140 provided sufficient authority for the issuance of refunding bonds in advance of the maturity or redemption of the outstanding bonds, because the outstanding bonds would be paid off with proceeds of the refunding bonds "as the outstanding bonds mature". Likewise, in the proposed advance refunding, although the refunding bonds will be issued in advance of

Governor Christopher S. Bond

maturity, the proceeds of the bonds will be utilized to pay off the outstanding bonds as they mature as contemplated by the statute. See, also, Opinion Letter No. 74, Keyes, 1978.

A second legal question on which you have asked our opinion in conjunction with the proposed advance refunding is whether further legislative or statutory authorization is required to enable the Board to issue advance refunding bonds. The provision of Section 8.430 which authorize the Board to issue refunding bonds do not set forth any requirement for additional legislative authorization for such bonds. However, Section 8.420.7, RSMo Supp. 1982, dealing with revenue bonds provides:

After August 13, 1976, any bonds which may be issued pursuant to the provisions of sections 8.370 to 8.450 shall be issued only for projects which have been approved by a majority of the house members and a majority of senate members of the fiscal affairs committee of the general assembly, so long as such committee exists, or by a majority of both houses of the general assembly if the fiscal affairs committee ceases to exist, and the approval by the fiscal affairs committee required by the provisions of section 8.380 shall be given only in accordance with this provision. For the purposes of approval of a project, the total amount of bonds issued for purposes of energy retrofitting in state-owned facilities shall be treated as a single project.

The question presented is whether these restrictions apply to an issue of refunding bonds issued pursuant to the provisions of Section 8.430. Under the authority of the Smith case discussed previously, the refunding bonds do not constitute a new obligation but rather create a substitute obligation for the outstanding bonds. The rationale of this case supports the notion that no additional legislative authorization is needed to enable the Board to issue refunding bonds. Section 8.420.7 requires such authorization for Bonds issued to finance "projects" under the provisions of Sections 8.370 to

Governor Christopher S. Bond

8.450, but no new projects are being authorized in the proposed advance refunding. Rather, the refunding bonds merely constitute a restructuring of or substitution for the existing outstanding bonds. The Board has sufficient authority pursuant to the provisions of Section 8.430 to issue the advance refunding bonds proposed and under the rationale of the Smith case the provisions of Section 8.420.7 are not applicable to the Refunding Bonds because no new projects are being authorized.

The Smith case also resolves another question which you present relating to the application of Section 8.420.6 to the proposed advance refunding. Section 8.420.6, RSMo Supp. 1982, provides that:

After August 13, 1976, the board shall not issue revenue bonds pursuant to the provisions of sections 8.370 to 8.450 for one or more projects, as defined in section 8.370, in excess of a total par value of one hundred million dollars.

The question presented is whether the Refunding Bonds will increase the total obligations outstanding under this provision. Since the Refunding Bonds will not constitute a new obligation under the Smith holding, the total bonds outstanding will not be increased by the issuance of Refunding Bonds for purposes of calculating the \$100,000,000 limitation of Section 8.420.6.

The third legal question presented involves the statutory restrictions on the terms of the Refunding Bonds. Section 8.430, RSMo 1978, provides in part as follows:

No refunding bonds issued pursuant to the provisions of sections 8.370 to 8.450 shall be payable in more than forty years from the date thereof or shall bear interest at a rate in excess of six percent per annum.

This statutory provision would appear to restrict the interest rate on refunding bonds to six percent and the maturity on such bonds to 40 years. The maturity limitation would present no

Governor Christopher S. Bond

problems for the proposed refunding. However, the interest rate limitation of six percent, if applicable, would make the proposed refunding infeasible. Although current interest rates on bonds of this type are very attractive, the State's financial advisors do not expect that the proposed refunding bonds would bear a rate of interest less than six percent per annum.

Although the express language of Section 8.430 limits the interest rate on refunding bonds to six percent, a 1982 amendment to Section 8.420 would appear to modify the six percent interest limitation of Section 8.430. Section 8.420.1 provides as follows:

1. Bonds issued under and pursuant to the provisions of sections 8.370 to 8.450 shall be of such denomination or denominations, shall bear such rate or rates of interest not to exceed fifteen percent per annum, and shall mature at such time or times within forty years from the date thereof, as the board determines. The bonds may be either serial bonds or term bonds.

By its terms, this provision would appear to amend, at least by implication, the restrictive interest rate limitation of Section 8.430.

The judicial doctrine of repeal by implication turns on the assumption that the legislature cannot always know the tremendous detail contained in the great mass of statutory law of the state. In addition, the legislature does not have the time to extensively research these statutory provisions to determine what previous statutes should be repealed to provide consistency with later statutory enactments. Thus in enacting legislation, a repeal of an existing statute may arise by necessary implication from enactment of a later statute without mention or reference to the prior law. Sutherland, Statutes and Statutory Construction, Section 23.09 (4th Ed. 1972) (hereafter "Sutherland"). The doctrine of repeal by implication rests on the ground that the last expression of legislative will should control. 73 Am.Jur.2d Statutes Section 392 (1974). This doctrine derives from the presumption that the legislature intended to achieve a consistent body of law. Sutherland, Section 23.09.

Generally, there is a presumption against implied repeal. Sutherland, Section 23.10, 73 Am.Jur.2d, supra, at Section 396, State v. Oswald, 306 S.W.2d 559, 562 (Mo. 1957). Statutes which appear to conflict must be harmonized if at all possible. Edwards v. St. Louis County, 429 S.W.2d 718, 721 (Mo. banc 1968). However, if a later act of the legislature is repugnant to a prior act, the prior act must be construed as repealed by implication to the extent of the conflict if the legislative intent to repeal is fairly shown. Id., State ex rel. Atkinson v. Planned Industrial Expansion Authority of St. Louis, 517 S.W.2d 36, 49 (Mo. banc 1975), Sutherland, Section 23.09. The ultimate guide is the intent of the legislature. Edwards, supra, at 722. While the rules of statutory construction are helpful, the purpose and object of the legislation should not be ignored. Id.

The clear purpose and object of the legislature in enacting amendments to Section 8.420 was to raise the interest rate limitation on bonds issued by the Board to levels which would permit marketing of those bonds. The more difficult question of intent is whether the legislature by amending Section 8.420, also intended to repeal the six percent interest limitation in Section 8.430 for refunding bonds.

Similar questions have been addressed by the Missouri Supreme Court in two prior cases and in both instances the repeal by implication doctrine was applied. The first case is the Edwards case cited previously. Edwards involved a question of repeal by implication presented when a general statute setting forth an interest rate limitation on bonds issued by all political subdivisions, Section 108.170, RSMO, was amended in 1967, to raise the interest rate limitation to six percent. The court was asked to determine whether this statute repealed by implication a four percent interest limitation in Section 108.080, RSMO 1959, on bonds issued by counties. The court held that while Section 108.080 was a special act applying to counties only, Section 108.170 applied to counties as well. Since the interest rates in the two statutes were totally repugnant, the more recent enactment of Section 108.170 repealed by implication the four percent limitation of Section 108.080. The court reasoned that its decision implemented the purpose of the legislation which was to enable political subdivisions to issue bonds for public improvements under current market conditions. Edwards, supra, at 722.

Governor Christopher S. Bond

The second case of note in analyzing the repeal by implication problem presented is the Atkinson case previously cited. Atkinson also involved the general interest rate limitation of Section 108.170. However, there the conflicting statute was Section 100.440 dealing with bonds of planned industrial expansion authorities. The Atkinson court relied on Edwards and held that because an authority was a municipality within the provisions of Section 108.170, the interest rate limitation found in Section 100.440 was repealed by implication. Atkinson, supra, at 49.

In the fact situation presented by your opinion request, the Refunding Bonds proposed to be issued by the Board are clearly bonds and thus are covered by the language of Section 8.420, RSMO Supp. 1982, which provides that:

Bonds issued under and pursuant
to the provisions of sections 8.370
to 8.450 . . . shall bear such rate
or rates of interest not to exceed
fifteen percent per annum . . .

This language is repugnant to the interest rate limitation expressed in Section 8.430. Thus, we believe the last act of the legislature, raising the interest rate limit of Section 8.420 to fifteen percent should be construed as repealing the prior act, Section 8.430, to the extent of conflict. This interpretation is consistent with the legislature's intent to aid the Board in issuance of bonds to carry out its purposes by setting interest rate limits high enough to allow marketing of those bonds.

In addition this interpretation is consistent with the statutory scheme contemplated by the legislature when the statutes relating to bonds issued by the Board were enacted in 1959. As originally enacted Section 8.420 relating generally to revenue bonds of the Board imposed an interest rate limitation of four percent while an interest rate of six percent was allowed under the provisions of Section 8.430 on refunding bonds. It is illogical to assume, without further evidence of intent, that the legislature intended to modify this scheme by allowing a fifteen percent interest rate on all bonds issued by the Board except for refunding bonds which could only bear interest at a rate of six percent. Such an interpretation would render the provisions of Section 8.430 authorizing refunding bonds a nullity.

Governor Christopher S. Bond

Finally you have asked if there are any other restrictions imposed on refunding bonds issued by the Board. Sections 8.420 and 8.430 set forth various restrictions on the form and terms of bonds issued by the Board. Generally such bonds must mature within 40 years and shall have such other terms as set by the Board. In addition such bonds, unless sold to the United States or to any agency or instrumentality thereof, must be sold at public sale for no less than ninety-eight percent of par.

CONCLUSION

It is the opinion of this office that the Board of Public Buildings has the authority pursuant to the provisions of Section 8.430, RSMo 1978, to issue refunding bonds in advance of the redemption call or maturity of the outstanding bonds to be refunded and that no further legislative authorization is necessary under the provisions of Section 8.420.7, RSMo Supp. 1982. In addition, the issuance of refunding bonds will not create an additional obligation of the Board for purposes of calculating the \$100,000,000 limitation on bonds of the Board imposed by Section 8.430. Finally, refunding bonds can bear a rate of interest not to exceed fifteen percent pursuant to the provisions of Section 8.430 and shall have such terms and shall be sold in the manner provided by Sections 8.420 and 8.430.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

July 28, 1983

OPINION LETTER NO. 109-83

The Honorable Carole Roper Park
Representative, District 52
11415 East Gill Street
Sugar Creek, Missouri 64054

Dear Representative Park:

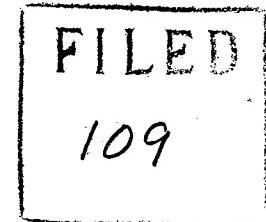
This is in response to your request for an opinion on the following question:

Is action necessary by both the governing body of Jackson County and the governing body of an incorporated area in Jackson County in order for a person licensed to sell intoxicating liquor by the drink at retail for consumption on the premises to remain open during the extended hours permitted by section 311.174, RSMo?

We understand that you are concerned only about incorporated areas in Jackson County other than Kansas City.

Section 311.174, RSMo Supp. 1982, states:

1. Any person possessing the qualifications and meeting the requirements of this chapter, who is licensed to sell intoxicating liquor by the drink at retail for consumption on the premises in a city with a population of over four hundred thousand which is located in whole or in part within a first class county having a charter form of government or in a first class county having a charter form of government which contains all or part of a city with a population of over four hundred thousand inhabitants, may apply to the supervisor of liquor control for a special permit to remain open on all days of the week except Sunday between the hours of 1:30 a.m. to 3:00 a.m. The provisions of section 311.097 shall apply to the sale of intoxicating liquor by the drink at retail for consumption on the



The Honorable George Roper Park

premises on Sunday. When the premises of such an applicant is located in a city as defined in this section, then the premises must be located in an area which has been designated as a convention trade area by the governing body of the city. When the premises of such an applicant is located in a county as defined in this section, then the premises must be located in an area which has been designated as a convention trade area by the governing body of the county.

2. An applicant granted a special permit under this section shall, in addition to all other fees required by this chapter, pay an additional fee of three hundred dollars a year payable at the time and in the same manner as its other license fees.

3. The provisions of this section allowing for extended hours of business shall not apply in any incorporated area wholly located in any first class county having a charter form of government which contains all or part of a city with a population of over four hundred thousand inhabitants until the governing body of such incorporated area shall have by ordinance or order adopted the extended hours authorized by this section.

This statute originated as part of Senate Bill No. 126, 1981 Mo. Laws 435.

It is the opinion of this office that before a person licensed to sell intoxicating liquor by the drink at retail for consumption on the premises may obtain a special permit from the Supervisor of Liquor Control for operation during the hours of 1:30 a.m. to 3:00 a.m. on all days of the week except Sunday in an incorporated area wholly located within Jackson County that is not a city with a population of over 400,000 inhabitants, the Jackson County Legislature must first designate the area as a convention trade area and the governing body of the incorporated area must by ordinance or order adopt the extended hours authorized by Section 311.174, RSMo Supp. 1982.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

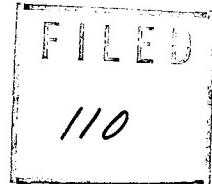
(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

November 14, 1983

OPINION LETTER NO. 110-83

The Honorable Joseph Treadway
Representative, District 102
1456 Telegraph
Lemay, Missouri 63125



Dear Representative Treadway:

This letter is in response to your question asking:

If the fire fighting equipment of the Lemay Fire District is called to the St. Louis Metropolitan Sewer District, in response to a fire alarm, may the fire protection district charge Metropolitan Sewer District, a tax exempt political subdivision, for the fire fighting services rendered?

It is our understanding that the Lemay Fire Protection District is located in St. Louis County. The special statutes applicable to St. Louis County fire protection districts are Sections 321.650 to 321.690, RSMo 1978 and Supp. 1982. The statutory provision enumerating the powers of fire protection districts in first class counties is Section 321.600, RSMo Supp. 1982. Cf. Section 321.220, RSMo Supp. 1982 (enumerating the powers of fire protection districts generally). None of these statutes authorize fire protection districts to charge fees for fire protection services. We do note that Section 321.226.1, RSMo Supp. 1982, authorizes any fire protection district which is authorized to provide emergency ambulance service to assess and collect a fee for such service. In prior opinion letters this office has found the charging of fire protection district fees authorized only under Section 321.226, RSMo. Opinion Letter No. 170, Steinmetz, 1981; Opinion Letter No. 141, Nilges, 1980; Opinion Letter No. 139, Melton, 1979, copies

The Honorable Joseph Treadway

enclosed. Therefore, this office concludes that the Lemay Fire Protection District is not authorized to charge the Metropolitan Sewer District a fee for fire protection services.

Very truly yours,



JOHN ASHCROFT
Attorney General

Enclosures: Opinion Letter No. 170, Steinmetz, 1981
Opinion Letter No. 141, Nilges, 1980
Opinion Letter No. 139, Melton, 1979

ABSENTEE VOTING:
ELECTION BALLOTS:
ELECTIONS:
EXECUTING WITNESSES:

An executing witness, as provided for in Section 486.340, RSMo 1978, is neither a notary public nor an other officer authorized by law to administer oaths within the scope of Section 115.291.1, RSMo 1978. Therefore, the affidavit of a person voting an absentee ballot may not be subscribed and sworn to before an executing witness.

October 27, 1983

OPINION NO. 114-83

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building, Room 209
Jefferson City, Missouri 65101

114

Dear Secretary Kirkpatrick:

This opinion is rendered in response to your questions asking:

1. Is the use of an "executing witness" as provided in Section 486.340 RSMo proper and legal in the notarization of a voted absentee ballot, instead of the use of a "notary public" or other "officer authorized by law to administer oaths" as required in Section 115.291 RSMo?
2. If the answer to question one is "yes" what application should be given to Section 115.637(10) RSMo [sic] which indicates that it is a class four election offense for "any person having in his possession any official ballot, except in the performance of his duty as an election authority or official, or in the act of exercising his individual voting privilege", since the "executing witness" would be transmitting the ballot in his possession to a notary public to accomplish the purpose of Section 486.340 RSMo?

The Honorable James C. Kirkpatrick

Section 115.291.1, RSMo 1978,^{1/} states in part:

Upon receiving an absentee ballot, the voter shall mark his ballot in secret, place the ballot in the ballot envelope, seal the envelope and fill out the affidavit on the ballot envelope. The affidavit of each person voting an absentee ballot shall be subscribed and sworn to before the election official receiving the ballot, a notary public or other officer authorized by law to administer oaths.

. . . [Emphasis added.]

Although election laws are to be liberally construed, *Matter of Rodriguez*, 558 S.W.2d 356, 360 (Mo. App. 1977), the word "shall" is indicative of a mandate, *State ex rel. Dreer v. Public School Retirement System of the City of St. Louis*, 519 S.W.2d 290, 296 (Mo. 1975).

As stated in *Garzee v. Sauro*, 639 S.W.2d 830, 832 (Mo. 1982):

In determining whether or not a statute is mandatory or directory, the general rule is that when a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. However, if it merely requires certain things to be done and nowhere prescribes the results that follow, such a statute is directory.

See *State ex rel. City of Memphis v. Hackman*, 273 Mo. 670, 202 S.W. 7, 14 (banc 1918) ("The general rule on this subject is that where a statute provides specifically that a ballot not in a prescribed form shall not be counted, the statute is mandatory and must be enforced; . . .").

Section 115.295.2 states:

If the affidavit on any ballot envelope has not been filled out, signed or witnessed by an officer authorized by law to administer oaths, the absentee ballot in the envelope shall be rejected.

1/

All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable James C. Kirkpatrick

The word "shall" in Section 115.291.1 and the prescription in Section 115.295.2 that affidavits on absentee ballot envelopes not filled out, signed, or witnessed by an officer authorized to administer oaths are not to be counted show that the second sentence of Section 115.291.1 is mandatory. Accordingly, the affidavit on an absentee ballot envelope must be subscribed and sworn to before one of following three types of officials and no others: (1) the election official receiving the ballot, (2) a notary public, or (3) an other officer authorized by law to administer oaths. No facts have been stated to lead us to believe that the executing witness in question is the election official receiving the ballot. The issue is whether an executing witness is a notary public or other officer authorized by law to administer oaths for purposes of Section 115.291.1.

Section 486.340 states:

1. As used in this section, the words "executing witness" means an individual who acts in the place of a notary.

2. An executing witness may not be related by blood or marriage or have a disqualifying interest as defined in section 486.255.

3. The affidavit of executing witness for acknowledgment by an individual who does not appear before a notary shall be in substantially the following form:

I, (name of executing witness), do solemnly affirm under the penalty of perjury, that (name of person who does not appear before a notary), personally known to me, has executed the within (type of document) in my presence, and has acknowledged to me that (he) executed the same for the purposes therein stated and requested that I sign my name on the within document as an executing witness.

..... (signature of executing witness)
Subscribed and affirmed before me this

.... day of ..., 19....

..... (official signature and official seal of notary.) [Emphasis in original.]

We believe that an executing witness, as provided for in Section 486.340, is not a notary public for purposes of Section 115.291.1. An executing witness is used in "place" of a notary

The Honorable James C. Kirkpatrick

public. Section 486.340.1. The language in Section 115.291.1 authorizing a person voting an absentee ballot to subscribe and swear to the same before a notary public cannot be read as authorizing a person, under penalty of perjury, to sign the absentee ballot as an executing witness. This is shown by the fact that the absentee ballot affidavits provided for in Section 115.283, RSMo Supp. 1982, state in relevant part:

Subscribed and sworn to before me
this day of, 19....
.....
Signature of notary or other officer
authorized to administer oaths

This language is inconsistent with the language of the affidavit of an executing witness, provided for in subsection 3 of Section 486.340.

We also believe that an executing witness is not an "other officer authorized by law to administer oaths." Section 115.291.1. Section 486.340 does not create an office. Executing witnesses do not receive commissions, nor do they have qualifications (other than the disqualifications referred to in subsection 2 of Section 486.340). The only power of an executing witness is to witness the execution of a document on penalty of perjury. Because Section 486.340 does not create an office, executing witnesses are not officers. Therefore, an executing witness is not an "other officer authorized by law to administer oaths." Section 115.291.1 (emphasis added). Also, because Section 486.340 does not create an office, an executing witness purporting to administer oaths cannot be considered a de facto officer. See *Redman v. St. Joseph Hay & Grain Co.*, 209 Mo. App. 682, 239 S.W. 540, 543 (1922).

Therefore, an executing witness is neither a notary public nor an "other officer authorized by law to administer oaths" within the meaning of Section 115.291.

Because of our answer to your first question, we believe it is unnecessary to answer your second question.

The Honorable James C. Kirkpatrick

CONCLUSION

It is the opinion of this office that an executing witness, as provided for in Section 486.340, RSMo 1978, is neither a notary public nor an other officer authorized by law to administer oaths within the scope of Section 115.291.1, RSMo 1978. Therefore, the affidavit of a person voting an absentee ballot may not be subscribed and sworn to before an executing witness.

Very truly yours,



JOHN ASHCROFT
Attorney General

DEEDS OF TRUST:
MORTGAGED PROPERTY:
PROMISSORY NOTES:
RECORDER OF DEEDS:

(1) A bank or trust company authorized to do a trust business need not be authorized to do a trust business in Missouri as a condition precedent to certifying pursuant to subsection 4 of Section 443.050, RSMo 1978, that a promissory note (or other instrument evidencing a debt) is the instrument or one of the instruments described in the deed of trust, mortgage, or other instrument securing such promissory note (or other instrument evidencing a debt), so long as the bank or trust company is authorized to do a trust business at the place where the certification occurs; and (2) if a mortgage, deed of trust, or other instrument intended to create a lien upon real estate to secure the payment of a debt or other obligation evidenced by an instrument or other instruments in writing is in proper form for recording and contains a provision in substantially the following form: "No promissory note (or other instrument evidencing a debt or other obligation) intended to be secured hereby shall be valid unless certified by a bank or trust company authorized to do a trust business to be the instrument or one of the instruments described in this deed of trust.", then a recorder of deeds in the State of Missouri may not require as a condition precedent to the recording of such mortgage, deed of trust, or other instrument either the presentment of (i) the note or other instrument or instruments representing the debt or obligation or any part thereof secured by such mortgage, deed of trust or other instrument or (ii) an executed copy of the certification by a bank or trust company in accordance with Section 443.050.4, RSMo 1978, the form of such certification or any other evidence that the note or other instrument or instruments evidencing the debt or obligation or any part thereof have in fact or will be so certified.

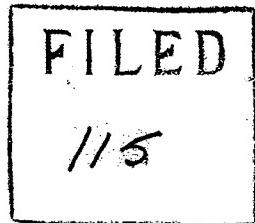
August 16, 1983

OPINION NO. 115-83

The Honorable Phillip A. Snowden
Senator, District 17
State Capitol Building, Room 330
Jefferson City, Missouri 65101

Dear Senator Snowden:

This is in response to your request for an official opinion on the following questions:



The Honorable Phillip A. Snowden

1. Must a bank or trust company authorized to do a trust business be authorized to do a trust business in Missouri as a condition precedent to certifying pursuant to section 4 of Rev. Stat. Mo. § 443.050 that a promissory note (or other instrument evidencing a debt) is the instrument or one of the instruments described in the deed of trust, mortgage or other instrument securing such promissory note (or other instrument evidencing a debt); and

2. If a mortgage, deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or other obligation evidenced by an instrument or instruments in writing contains a provision in substantially the following form:

"No promissory note (or other instrument evidencing a debt or other obligation intended to be secured hereby) shall be valid unless certified by a bank or trust company authorized to do a trust business to be the instrument or one of the instruments described in this deed of trust."

must a recorder of deeds in the State of Missouri if such mortgage, deed of trust or other instrument is in proper form for recording, record such mortgage, deed of trust or other instrument without requiring as a condition precedent to the recording of such mortgage, deed of trust or other instrument the presentment to such recorder of deeds of either:

- (i) the note or other instrument or instruments representing the debt or obligation or any part thereof secured by such mortgage, deed of trust or other instrument; or
- (ii) an executed copy of the certification by a bank or trust company in accordance with Section 4 of Rev. Stat. Mo. § 443.050, the form of such certification or any other evidence that the note or other instrument or instruments evi-

The Honorable Phillip A. Snowden

dencing the debt or obligation or any part thereof have in fact or will be so certified.

Section 443.050, RSMo 1978,^{1/} provides in pertinent part:

1. In all cities in this state which now have or may hereafter have six hundred thousand inhabitants or more, and in all counties of class one and two, when any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing, shall be filed for record, the instrument or instruments representing the principal of such debt or obligation or any part thereof shall be presented to the recorder of deeds at the time of such filing for record, or in the case the mortgage or deed of trust or other instrument is to be filed in more than one county, then to the recorder of the county where first filed, and the recorder shall, for the compensation of twenty-five cents for each of the first four of such instruments identified by him and ten cents for each additional instrument identified by him, stamp or write upon each such instrument evidencing principal so secured an identification thereof as being a note, bond or other evidence of debt described by such mortgage, deed of trust or other instrument of security.

• • •

4. Nothing herein shall be construed to apply to any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing executed by railroad corporations, telephone corporations, or other public service corporations subjected to regulation or supervision as to the issuance of securities by a public commission, board, or officer of the government of the United States

1/

All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable Phillip A. Snowden

or of any state or territory thereof; nor to other instruments in writing which, by the terms thereof or by the terms of such indenture, shall not be valid unless certified by a bank or trust company authorized to do a trust business to be the instrument, or one of the instruments, described in such indenture.
[Emphasis added and revisor's note omitted.]

In answer to your first question, in 1963 the General Assembly eliminated language in subsection 4 of Section 443.050, RSMo Supp. 1961, which required that the certifying bank or trust company be authorized to do a trust business in the State of Missouri. H.B. 428, 1963 Mo. Laws 647. The current version of the statute contains no such requirement, and, therefore, the certification described in Section 443.050.4 may be performed by any bank or trust company authorized to do a trust business at the place where the certification occurs.

Your second question asks whether, given certain language in a mortgage instrument, a recorder of deeds must record such an instrument without requiring the presentation of either the debt instrument itself or a copy of a certification by a bank or trust company in accordance with subsection 4 of the statute or some other evidence that the debt instrument is or will be certified. The answer to this question depends upon the effect of the exclusion contained in subsection 4 of the statute. In examining the effect of a single provision, the entire act must be considered together and harmonized, if possible. *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441 (Mo. banc 1980). Section 443.050 as a whole creates a condition precedent to the filing of certain mortgage instruments; namely, if the mortgage instrument secures an obligation evidenced by a written debt instrument, the debt instrument itself must be presented for identification at the time the mortgage instrument is recorded. Subsection 4 of the statute frees certain instruments from the requirement of presentment. The first group consists of mortgages which secure debt instruments executed by public service corporations, the issuance of the securities of which are regulated or supervised by a federal or state body. The second group consists of written instruments which by their own terms or "by the terms of such indenture" state that they are not valid without proper certification.

The purpose and object of a statute being construed must always be considered. *State v. Kraus*, 530 S.W.2d 684 (Mo. banc 1975). As a whole, Section 443.050 was intended to assure the validity of recorded mortgages by requiring the identification of the secured debt. The general principal has been stated in the following words:

The Honorable Phillip A. Snowden

In order to render a mortgage valid as a lien on the land conveyed, as against third persons claiming interests, and to make it enforceable by foreclosure, it is necessary that it contain a description or identification of the debt or liability intended to be secured by the mortgage.

. . . a reference to the subject matter secured is sufficient if thereby a means is afforded of ascertaining what the encumbrance really is. . . . [59 C.J.S. Mortgages Section 112 (1949) (footnotes omitted)].

Certain types of instruments, however, do not require strict identification procedures. The two exceptions which appear in subsection 4 are of this type. First, certain entities, because they are regulated by various public bodies as to the issuance of securities, are allowed to record mortgage instruments without presenting the related debt instruments for identification. Likewise, in the exception to be examined in this opinion, certain instruments incorporate language which allows for certainty and security, namely, those instruments which either on their face or on the face of the indenture contain the warning that related debt instruments are not valid unless certified. Such a warning provides enough certainty to justify allowing the mortgage instrument to be recorded without requiring the presentation and identification of the related debt instruments.

When these types of instruments are removed from the operation of the presentation requirement of Section 443.050, the preceding section which sets out the general procedure for identification of debt instruments controls. Section 443.040.1 states in pertinent part that:

Hereafter when any mortgage or deed of trust or other lien to secure the payment of any specific obligation is created on real estate by an instrument to be filed in the office of the recorder of deeds to secure the payment of notes or bonds or other obligations in writing, the instrument evidencing such debt or debts or obligations so secured may be presented to the recorder at the time of filing for record such mortgage or deed of trust or instrument in writing, and the recorder shall, for the compensation of twenty-five cents for each instrument so filed (exclusive of the coupons thereon), stamp or write upon such note, or other promissory evidence of debt so secured, an identification

The Honorable Phillip A. Snowden

thereof as being the note or other evidence of debt described by such security instrument.
[Emphasis added.]

Section 443.040.1 states that instruments evidencing debts "may" be presented to the recorder when the mortgage instruments are recorded. Unless the contrary is indicated, the term "may" in a statute is interpreted to be permissive and not mandatory. *Bloom v. Missouri Board for Architects, Professional Engineers and Land Surveyors*, 474 S.W.2d 861 (Mo. App., St. L. 1971). Thus, when the mandatory presentation requirements of Section 443.050 are eliminated by the exclusions contained in subsection 4, the permissive presentation language in Section 443.040 makes presentation optional.

Therefore, if either the instrument itself or the related indenture contains the necessary language to bring the instrument or indenture within the scope of the exclusion in subsection 4, the recorder of deeds is without authority to impose the mandatory identification requirements contained in Section 443.050 or any other requirements which are not contained in the statutes. Such presentation is optional under Section 443.040. This office is of the opinion that the language quoted in your question, if appearing on the instrument to be recorded, does contain the necessary language to make the exclusion in subsection 4 of Section 443.050 applicable.

CONCLUSION

It is the opinion of this office that:

(1) A bank or trust company authorized to do a trust business need not be authorized to do a trust business in Missouri as a condition precedent to certifying pursuant to subsection 4 of Section 443.050, RSMo 1978, that a promissory note (or other instrument evidencing a debt) is the instrument or one of the instruments described in the deed of trust, mortgage, or other instrument securing such promissory note (or other instrument evidencing a debt), so long as the bank or trust company is authorized to do a trust business at the place where the certification occurs; and

(2) if a mortgage, deed of trust, or other instrument intended to create a lien upon real estate to secure the payment of a debt or other obligation evidenced by an instrument or other instruments in writing is in proper form for recording and contains a provision in substantially the following form:

No promissory note (or other instrument evidencing a debt or other obligation) intended to be secured hereby shall be valid unless

The Honorable Phillip A. Snowden

certified by a bank or trust company authorized to do a trust business to be the instrument or one of the instruments described in this deed of trust.

then a recorder of deeds in the State of Missouri may not require as a condition precedent to the recording of such mortgage, deed of trust, or other instrument either the presentment of:

- (i) the note or other instrument or instruments representing the debt or obligation or any part thereof secured by such mortgage, deed of trust or other instrument; or
- (ii) an executed copy of the certification by a bank or trust company in accordance with Section 443.050.4, RSMo 1978, the form of such certification or any other evidence that the note or other instrument or instruments evidencing the debt or obligation or any part thereof have in fact or will be so certified.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John Landwehr.

Very truly yours,



JOHN ASHCROFT
Attorney General

LAND RECLAMATION COMMISSION:
MERIT SYSTEM:
NATURAL RESOURCES, DEPARTMENT OF:
OFFICERS:
REORGANIZATION ACT:
STATE OFFICERS:

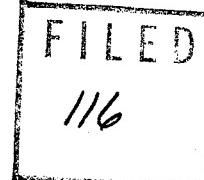
divisions (1) through (10) of Section 36.030.1.

Pursuant to Section 36.030.1, RSMo Supp. 1982, the employees of the Land Reclamation Commission are subject to the merit system provisions in Chapter 36, RSMo, with such exempt positions as may be provided for under subdivisions

June 9, 1983

OPINION NO. 116-83

Mr. Fred A. Lafser
Director
Department of Natural Resources
1915 Southridge Plaza
Jefferson City, Missouri 65101



Dear Mr. Lafser:

This is in response to your request for an opinion on the following question:

Was the Land Reclamation Program within the Division of Environmental Quality, Department of Natural Resources, placed under Chapter 36, RSMo, by the State Personnel Law of 1979?

In Opinion No. 237, Bond, 1974, we held that employees of the Land Reclamation Commission were not subject to the merit system provisions in Chapter 36, RSMo, in effect in 1974. Our opinion was based on Section 10.6 of the Omnibus State Reorganization Act of 1974, Appendix B, RSMo 1978, which provides that "all necessary personnel required by the [land reclamation] commission shall be selected, employed and discharged by the commission." We interpreted this provision to constitute a specific exception to Section 10.2 of the 1974 Reorganization Act, which provided that all employees of the Department of Natural Resources were to be appointed by the Department director in accordance with the merit system. Because Land Reclamation Commission employees were to be appointed by the Commission, not the Department director, we found Section 10.2 of the Reorganization Act inapplicable to Commission employees.

Chapter 36 was substantially revised in 1979, Laws 1979, CCS for HB 673. Included was a revision of Section 36.030, RSMo Supp. 1982, which sets forth the basic coverage of and exclusions from the state merit system. Section 36.030.1 now provides as follows:

Mr. Fred A. Lafser

A system of personnel administration based on merit principles and designed to secure efficient administration is established for all offices, positions and employees, except attorneys, of . . . the department of natural resources [and other designated departments, divisions and agencies]. . . .

The provisions of Section 36.030 in effect in 1974 did not extend coverage of the merit system to the Department of Natural Resources, although Section 10.2 of the Reorganization Act accomplished such result, except with respect to employees of the Land Reclamation Commission. However, the 1979 amendments to Section 36.030.1 specifically include the Department of Natural Resources as one of the covered departments, without any apparent exclusion of the employees of the Land Reclamation Commission. In order to answer your question, we must determine whether the legislature intended by the 1979 amendments to Section 36.030 to change the effect of Section 10 of the 1974 Reorganization Act, as it relates to the coverage of the merit system.

The primary role of statutory construction is to ascertain the legislative intent from the language used, and where possible to consider the words used in their plain and ordinary meaning. City of Willow Springs v. Missouri State Librarian, 596 S.W.2d 441 (Mo. banc 1980). While it is a general rule that repeals by implication are not favored, and where there are two or more acts on one subject both should be given effect if possible, if they are repugnant in any of their provisions, the later act will operate, to the extent of the repugnancy, to repeal the earlier act. City of Kirkwood v. Allen, 399 S.W.2d 30 (Mo. banc 1966).

As noted earlier, Section 36.030 did not, prior to the 1979 amendment, include the Department of Natural Resources within the coverage of the merit system. In the 1979 amendment the legislature chose, in clear and comprehensive terms, to include within the merit system all offices, positions and employees of the Department of Natural Resources. The plain and ordinary meaning of the words used by the legislature suggests that it did not intend to preclude or exempt any of the various divisions, agencies and programs within the Department from the coverage of the merit system.

Further, there appears to us to be no rational way to reconcile the differences between the coverage of the merit system as expressed in Section 10 of the 1974 Reorganization Act, with the broadened coverage as expressed in present Section 36.030.1, so

Mr. Fred A. Lafser

that we could give effect to both. We believe that a true repugnancy exists between the two acts, as it is not possible to give effect to the all-inclusive coverage of Section 36.030.1, as it relates to the Department of Natural Resources, yet also give effect to the exclusion of the Land Reclamation Commission employees from the merit system, as expressed in Section 10 of the 1974 Reorganization Act. Therefore, we believe that the provisions of the later enactment must control.

Our conclusion is buttressed by the familiar rule of statutory construction that a change in a statute is ordinarily intended to have some effect, and the legislature will not be presumed to have intended a meaningless or useless act. City of Willow Springs v. Missouri State Librarian, supra. The legislature had previously amended Section 36.030 in the First Extraordinary Session of the 77th General Assembly, the same session in which the 1974 Reorganization Act was enacted. At that time the legislature chose not to bring the Department of Natural Resources within Chapter 36 directly, but to do so indirectly via Section 10 of the Reorganization Act. By the specific inclusion of all offices, positions and employees of this Department within Chapter 36, without any apparent exclusion of the Land Reclamation Commission employees, the legislature must have intended by the 1979 amendment to affect some change in the situation as it formerly existed. As Section 10.2 of the Reorganization Act already provided for merit system coverage of all positions within the Department of Natural Resources, other than Land Reclamation Commission employees, the legislature must have intended by the 1979 amendment to Section 36.030 to bring the latter employees within the coverage of the merit system.

We would note that our opinion that the provisions of present Section 36.030.1 take precedence over Section 10 of the Reorganization Act does not render meaningless Section 10.6 of the Reorganization Act for all purposes. The enactment of a provision which is repugnant to an earlier enactment accomplishes a repeal by implication only to the extent of the repugnancy. If other provisions of the earlier enactment are not repugnant to the later act, those provisions remain in force and effect. As the 1979 amendment to Section 36.030.1 does not purport to change the appointing authority for positions within the Department of Natural Resources, we believe that Section 10.6 of the Reorganization Act, as it provides for the selection, employment and discharge by the Land Reclamation Commission of all personnel required to carry out the Commission's powers and duties, remains unchanged.

Mr. Fred A. Lafser

Section 36.030.1 also contains in 10 subdivisions various provisions for exemption of positions from the coverage of the merit system. We do not address in this opinion the question what employees of the Land Reclamation Commission may be outside the coverage of the merit system under these exemptions.

CONCLUSION

It is the opinion of this office that pursuant to Section 36.030.1, RSMO Supp. 1982, as amended in 1979, the employees of the Land Reclamation Commission are subject to the merit system provisions in Chapter 36, RSMO, with such exempt positions as may be provided for under subdivisions (1) through (10) of Section 36.030.1.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Dan Summers.

Very truly yours,



JOHN ASHCROFT
Attorney General

ADMINISTRATION, COMMISSIONER OF:
CONTRACTS:
HIGHWAYS AND TRANSPORTATION, DEPARTMENT OF:
OFFICE OF ADMINISTRATION:
PURCHASING AGENT:

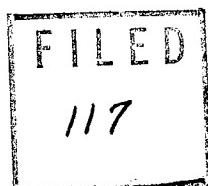
The Commissioner
of Administration
has the responsi-
bility to purchase
data processing
services and to

purchase, rent, or lease data processing equipment for the Department of Highways and Transportation; the Department of Highways and Transportation may purchase, rent, or lease such equipment or services only if the Commissioner of Administration delegates such authority to the department pursuant to Section 34.100.

June 9, 1983

OPINION NO. 117-83

John A. Pelzer
Commissioner of Administration
Capitol Building, Room 125
Jefferson City, Missouri 65101



Dear Mr. Pelzer:

You have requested an opinion on the following question:

Is the Commissioner of Administration responsible for purchasing, leasing, and/or renting data processing equipment, supplies and services for the Department of Highways and Transportation?

Section 34.030, RSMo 1978,¹ states:

The commissioner of administration shall purchase all supplies for all departments of the state, except as in this chapter otherwise provided. The commissioner of administration shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state. [Emphasis added.]

1. All statutory references are to RSMo 1978, unless otherwise indicated.

John A. Pelzer

Section 34.010.2 defines the word "department" as any "department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments." The Department of Highways and Transportation is a department of the State in the executive branch of Missouri government. Article IV, Section 12, Missouri Constitution. Therefore, the Department of Highways and Transportation is a "department" under the definition of that word in Section 34.010.2.

Section 34.010.4 defines the words "supplies" as "supplies, materials, equipment, contractual services and any and all articles or things, except as in this chapter otherwise provided." Section 34.010.1 defines the words "contractual services" to "include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service." Data processing equipment, as a type of equipment, comes within the definition of the word "supplies" in Section 34.010.4. Data processing services are a type of "contractual service" within the definition of that phrase in Section 34.010.1 and are a type of "supplies" under Section 34.010.4. When data processing equipment is rented or leased, it is "purchased" for purposes of Section 34.010.3. Therefore, the Commissioner of Administration has the authority to purchase data processing services and to purchase, rent, or lease data processing equipment for the Department of Highways and Transportation. The Department of Highways and Transportation may purchase, rent, or lease such equipment or services only if the Commissioner of Administration delegates such authority pursuant to Section 34.100.

2. In Opinion No. 28, Ferguson, 1943, we concluded that "contractual services" were limited to those services enumerated in the statute. In Opinion No. 163, Nielsen, 1975, we formally withdrew the 1943 opinion and concluded that the word "include" in the definition of "contractual services" indicates that contractual services are not limited to those items specifically mentioned in the statute. In Opinion Letter No. 22, Muckler, 1980, we concluded that the historical learned professions, law and medicine, are exempt from the provisions of the State Purchasing Law. In Opinion No. 128, Bradford, 1981, we refused to expand the "professional services exemption" to include engineering.

Most data processing service contracts will be of a routine nature, e.g., repairs, but even if the contract in question were a consultant contract involving the design or engineering of a processing system, such would be a "contractual service" under Section 34.010.1.

John A. Pelzer

The legislature has spoken very clearly in regard to data processing acquisition. Section 37.110 establishes a data processing unit in the Office of Administration and states in part: "No state data processing equipment shall be added or disposed of by any state agency by sale, lease or otherwise without the approval of this unit." Section 15.9 of the Omnibus State Reorganization Act of 1974, App. B, RSMo 1978, provides in part: "The commissioner of administration is hereby authorized to coordinate and control the acquisition and use of electronic data processing (EDP) and automatic data processing (ADP) in the executive branch of state government. . . ."

Apparently, Opinion No. 82, Cantrell, 1968, has caused some confusion. Among other things, this opinion dealt with the exemption in Section 34.030 for leases and purchases of land by departments with the constitutional power to acquire land. This opinion concluded that the State Highway Commission, predecessor of the State Highways and Transportation Commission, was entitled to this exemption, because it had such a constitutional power under Article IV, Section 30, Missouri Constitution (repealed). There is language in this opinion to the effect that supplies necessary in or incident to the construction of state highways fall into this exemption. This language should not be read as authorizing the State Highways and Transportation Commission to interfere with the coordinated data processing system provided for the State by the General Assembly through the creation of the Electronic Data Processing Coordination Division of the Office of Administration.

CONCLUSION

It is the opinion of this office that the Commissioner of Administration has the responsibility to purchase data processing services and to purchase, rent, or lease data processing equipment for the Department of Highways and Transportation; the Department of Highways and Transportation may purchase, rent, or lease such equipment or services only if the Commissioner of Administration delegates such authority to the department pursuant to Section 34.100.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Phillip K. Gebhardt.

Very truly yours,



JOHN ASHCROFT
Attorney General

CAMPAIGN FINANCE REVIEW BOARD:
ELECTIONS:
PUBLIC RECORDS:
RECORDS:
SECRETARY OF STATE:
SUNSHINE LAW:

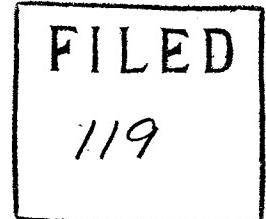
Records of the Campaign Reporting Division of the Secretary of State's Office are open to inspection by the public.

August 29, 1983

OPINION NO. 119-83

The Honorable James C. Kirkpatrick
Secretary of State
State Capitol Building
Jefferson City, Missouri 65101

Dear Mr. Kirkpatrick:



You have requested our opinion on the following questions:

- (1) Are records of candidates and committees which fail to file reports and records of other potential violations of Chapter 130 RSMo "public records," as such records are created and maintained by the Campaign Reporting Division pursuant to the duties of the Secretary of State under Chapter 130 RSMo?
- (2) Is there any distinction as to "confidentiality" or availability as a "public record" under Chapter 610 RSMo and Chapter 130 RSMo in regard to the types of correspondence, memoranda, and records held by the Secretary of State under circumstances described below? Are letters of reply, records of conversations, and other records relating to these documents also public records?

-Copies of "non-reporting notices" to filed candidates and registered committees regarding failure to file election or supplemental Committee Disclosure Reports. (See Attachment A) A copy of the letter is sent to the Campaign Finance Review Board at the time of mailing.

The Honorable James C. Kirkpatrick

-Copies of "non-reporting notices" to registered committees which have not previously filed a Committee Disclosure Report for an election, but which have been reported as a recipient of contributions or contributor by a candidate or ballot measure committee which has filed reports for the election. (See Attachment B). A copy of the letter is sent to the Campaign Finance Review Board at the time of mailing.

-Copies of informational "multi-candidate letters" to organizations which may have failed to file reports as "continuing committees" or "political party committees" depending upon the nature and purpose of the organization and the dollar amounts received and expended. Organizations receiving such letters are not registered or reporting committees, but have been reported by a candidate or ballot measure committee as contributing or receiving funds for an election in an amount of above \$50. The letter explains committee reporting requirements and the circumstances in which delinquent reports would be due from the organization. (See Attachment C)

-"Referral" memoranda to the Campaign Finance Review Board listing candidates and committees which have failed to report after receiving a "non-reporting notice" (i.e. Attachments A and B). Such referrals are generally made about thirty days after the date of the "notice." (See Attachments D and E)

-Memoranda to the Campaign Finance Review Board listing organizations which may have failed to report as committees which previously received a letter explaining committee reporting requirements (i.e. Attachment C). Committees listed in such memoranda have neither filed Committee Disclosure Reports nor responded in writing to the letter. (See Attachment F)

The Honorable James C. Kirkpatrick

-Memoranda to the Review Board concerning apparent violations of Chapter 130 RSMo requirements concerning the Reporting Exemption Statement, registration requirements, record keeping or restrictions on financial transactions. (See Attachments G and H)

-Copies of "deficiency letters" regarding reports and statements filed by candidates and committees which are not "properly completed" or are not filed "as required by law." "Deficiency letters" explain requirements of Chapter 130 RSMo and inform persons filing reports of amendments or other action needed to meet Chapter 130 requirements. (See Attachment I)

-Copies of certified letters to candidates, regarding their ineligibility to take office under Section 130.071 RSMo. That section provides that a candidate "shall not take office" if the candidate or his committee has failed to file one or more disclosure reports, "until such reports shall have been filed." The letter identifies delinquent reports and explains reports which need to be filed in order for the candidate to meet the eligibility standards of Section 130.071 RSMo. [Emphasis in original.]

- (3) Is there any difference in the status of any records held by the Secretary of State regarding compliance with Chapter 130 RSMo, depending on whether it is before or after an election?
- (4) If all or a portion of "compliance records" held by the Secretary of State are public records, are records of that type open to the public beginning:
 - Upon the effective date of Chapter 130 RSMo on August 13, 1978?

The Honorable James C. Kirkpatrick

-Upon amendments to Chapter 610 RSMo effective August 13, 1982?

-Or upon some other date?

Section 130.056, RSMo Supp. 1982, provides in pertinent part:

1. The secretary of state shall administer the provisions of this chapter and, in connection therewith, shall:

. . . ;

(3) Make the reports and statements filed with him available for public inspection and copying, commencing as soon as practicable but not later than the end of the second day after which a report was received, and permit copying of any such report or statement by hand or by duplicating machine, as requested by any person, at the expense of such person, but no information obtained from such reports and statements shall be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose;

(4) Examine each report and statement filed with his office under the requirements of this chapter to determine if the statements are properly completed and filed within the time required by this chapter;

(5) Notify a person required to file a report or statement under this chapter with the secretary of state immediately if, upon examination of the official ballot or other circumstances surrounding any election, it appears that the person has failed to file a report or statement as required by law; . . . [Emphasis added.]

It is our understanding that the Secretary of State formed a Campaign Reporting Division to perform the duties described in Section 130.056, RSMo Supp. 1982.

Section 130.061, RSMo 1978, establishes a Campaign Finance Review Board (hereinafter sometimes referred to as "Board"). The Board is assigned to the Secretary of State's Office. However, pursuant to Section 130.061.6, RSMo 1978, the Secretary of State's supervision of the Board "does not extend to substantive matters relating to policies or enforcement functions."

The Honorable James C. Kirkpatrick

As required by Section 130.056.1, RSMo Supp. 1982, the Secretary of State's Office is responsible for, *inter alia*, accepting filings from political candidates and political committees and notifying such candidates and committees of their failure to file campaign finance reports and statements in a timely or proper manner. In the event that a candidate or a committee does not respond to a deficiency letter or a non-reporting notice issued by the Campaign Reporting Division, the Division places the name of that candidate or committee on a "referral" memorandum to the Campaign Finance Review Board. The referral memorandum sets forth the Secretary of State's findings as to the nature of the failure of the candidate or committee to meet the requirements of the law. Upon receipt of the memorandum, the Board investigates the findings and reports apparent violations of the Campaign Finance Disclosure Law to the appropriate prosecuting attorney.

Your first and second questions involve the non-reporting notices, deficiency letters, referral memoranda and similar compliance documents which are generated by the Campaign Reporting Division of your office. In this regard, it is our view that Section 130.056.1(3), RSMo Supp. 1982, as quoted above, does not apply in that the reports and statements which are to be made available under that subsection are those filed with the Secretary of State as distinguished from those which are generated by the Secretary of State's Office pursuant to subsections 4 and 5.

For purposes of this opinion, and relating specifically to records retained by the Campaign Reporting Division of the Secretary of State's Office, we believe that the Division is a "public governmental body" as defined in Section 610.010(2), RSMo Supp. 1982. Further, we believe that the documents retained by the Campaign Reporting Division are "public records" as defined in Section 610.010(4), RSMo Supp. 1982, and as such, are subject to the provisions of Missouri's Sunshine Law, Section 610.010, et seq., RSMo.

Section 610.015, RSMo 1978, provides in pertinent part:

Except as provided in section 610.025,
and except as otherwise provided by law, . . .
public records shall be open to the public for
inspection and duplication.

Thus, unless a specific provision of the Campaign Finance Disclosure Law expressly prohibits the disclosure of the Secretary of State's records of candidates and committees which fail to file reports or whose reports are deficient in some way, correspondence, memoranda, notices and other records such as those described in your second question which are held by the Secretary of State pursuant to Chapter 130, RSMo, are "public records" which must be disclosed pursuant to Section 610.015.

The Honorable James C. Kirkpatrick

Section 130.066(5), RSMo 1978, provides in pertinent part:

All investigations by the board prior to an election shall be strictly confidential. . . . Details of all investigations shall be confidential with the exception of notification of the complainant or the person under investigation;

In Opinion Letter No. 142-80, Strong, 1980, we opined that prior to an election the Board's investigation records are not public records, that the Campaign Finance Review Board must hold closed meetings with respect to such investigations, and that the votes of the Board with respect to such investigations are closed votes. In addition, we concluded that details of all investigations of the Board remain confidential after an election as well as prior to the election.

We do not believe that the provisions of Section 130.066(5), which are directed specifically to the Board, apply to the records maintained by your office pursuant to Chapter 130, RSMo. The legislature has expressly provided for public access to the filings of candidates and committees required by Chapter 130. Section 130.056.1(3). Whether or not a candidate or committee files a report, or does so properly, pursuant to Chapter 130 or the regulations promulgated thereunder, is readily discoverable by any person who, by virtue of his or her Section 130.056.1(3) right to inspect, wishes to inspect candidate or committee filings on record. The authority to investigate violations of the Campaign Finance Disclosure Law is vested in the Board and not in the Division. Section 130.066(5). We do not believe the notice provided the Board, the candidate or committee by the Division constitutes an investigation, contains the fruit of any investigation, or sets out information not otherwise discoverable by the general public pursuant to Section 130.056.1(3). Consequently, we believe that the public may inspect those records enumerated in your second question, pursuant to the rights of access established in this state under Chapter 610.

This view is buttressed by the provisions of Section 28.070, RSMo 1978, which provides as follows:

The governor and the members of either house of the general assembly, or committees thereof, shall have free access to his [the Secretary of State] office for the inspection and examination of all books, papers, records and proceedings. All public records on file in his office are subject to inspection by any

The Honorable James C. Kirkpatrick

person during regular office hours and when inspection will not interfere with the orderly performance of duties. [Emphasis added.]

In addition, see, State ex rel. Kavanaugh v. Henderson, 350 Mo. 968, 169 S.W.2d 389 (1943); State ex rel. Eggers v. Brown, 345 Mo. 430, 134 S.W.2d 28 (banc 1939); State ex rel. Conran v. Williams, 96 Mo. 13, 8 S.W. 771 (1888); State ex rel. Thomas v. Hoblitzelle, 85 Mo. 620 (1885); and Disabled Police Veterans Club v. Long, 279 S.W.2d 220 (Mo. App. 1955), which discuss a common law right of access to public records long-recognized in Missouri.

In response to your third question, in Opinion Letter No. 142-80, Strong, 1980, we concluded that investigation information is confidential before an election and that details of an investigation are confidential both before and after an election. Because we do not believe the records of the Campaign Reporting Division constitute an investigation, and having concluded that such records are open to inspection, any distinction between investigation information and details of an investigation, or the timing of their availability for public inspection, vis-a-vis an election, is not relevant. Therefore, we conclude that there is no difference in the status of records held by the Secretary of State's Office depending on whether a request to inspect is made before or after an election.

In response to your fourth question, we note the Campaign Finance Disclosure Law originated as C.C.S.S.C.S.S.B. 839, 1978 Mo. Laws 416, and was effective August 13, 1978. Since the documents collected pursuant to Chapter 130 by the Campaign Reporting Division of your office were first required to be filed with the effective date of the law, August 13, 1978, it is our opinion that the records of the division were open to the public beginning that date.

CONCLUSION

It is the opinion of this office that records of the Campaign Reporting Division of the Secretary of State's Office are open to inspection by the public.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

JOHN ASHCROFT
ATTORNEY GENERAL

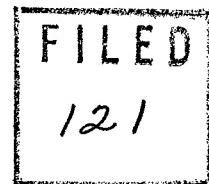
POST OFFICE BOX 899
JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

July 7, 1983

OPINION LETTER NO. 121-83

The Honorable Randall L. Robb
Representative, District 33
701 South Woodland Drive
Kansas City, Missouri 64118



Dear Representative Robb:

This letter is issued in response to your request for an opinion as to whether a licensee is entitled to restoration of his driving privileges after termination of a suspension without showing proof of responsibility where the suspension was for points under Chapter 302, RSMo, and not for failure to provide financial responsibility under Chapter 303, RSMo.

"Proof of financial responsibility" is a term of specific meaning under Chapter 303, the Motor Vehicle Safety Responsibility Law. It is defined in Section 303.020(10), RSMo Supp. 1982, as the proof of ability to respond in damages at a stated minimal level for liability occurring subsequent to the effective date of said proof on account of accidents arising out of the ownership, maintenance or use of a motor vehicle. The various means for demonstrating such proof are contained in Section 303.160, RSMo 1978.

That such proof must be given prior to reinstatement of driving privileges suspended for the accumulation of points is mandated by clear and specific statutory language. Section 302.304.2, RSMo Supp. 1982, requires the Director of Revenue to suspend the driving privileges of anyone who has accumulated eight points within eighteen months and further provides that reinstatement is not permissible unless proof of financial responsibility in accordance with Chapter 303, RSMo, is filed and maintained by the licensee for two years.

Very truly yours,

JOHN ASHCROFT
Attorney General

INSURANCE:

INVESTMENT OF STATE RETIREMENT SYSTEM FUNDS:
NONTEACHER SCHOOL EMPLOYEES' RETIREMENT SYSTEM:
PUBLIC SCHOOL RETIREMENT SYSTEM:
SECURITIES:

The Board of
Trustees that
administers The
Public School
Retirement Sys-
tem of Missouri

and The Non-Teacher School Employee Retirement System of Missouri may not invest funds of these systems in direct equity ownership of real property for the purpose of producing income; such board may invest funds of these systems in pooled real estate investment funds for the purpose of producing income.

December 5, 1983

OPINION NO. 122-83

David W. Mustoe, Executive Secretary
The Public School Retirement System of Missouri
Post Office Box 268
Jefferson City, Missouri 65102

122

Dear Mr. Mustoe:

This opinion is in response to your questions asking:

- (1) Can the Board of Trustees which administers The Public School Retirement System of Missouri and The Non-Teacher School Employee Retirement System of Missouri legally place funds of the Systems in direct equity ownership of real property for the purpose of producing income?
- (2) Can the Board of Trustees which administers The Public School Retirement System of Missouri and The Non-Teacher School Employee Retirement System of Missouri legally place funds of the Systems in pooled real estate investment funds for the purpose of producing income?

The Public School Retirement System of Missouri is organized pursuant to Sections 169.010 to 169.140, RSMo 1978 and Supp. 1982. The Nonteacher School Employee Retirement System of Missouri is organized pursuant to Sections 169.600 to 169.710, RSMo 1978 and Supp. 1982. Both systems are administered by the same board of trustees. Section 169.610.2, RSMo 1978.

Section 169.040.2, RSMo 1978, which is applicable to The Public School Retirement System of Missouri, states:

2. The board shall invest all funds under its control which are in excess of a safe operating balance. The investment shall be made only in the following classes of securities:

- (1) Bonds or other obligations of the United States;
- (2) Bonds guaranteed by the United States;
- (3) Tenant-purchase loans which are secured by fully insured mortgages as provided for in the act of Congress known as the "Farmers Home Administration Act of 1946" as amended (7 U.S.C.A. § 1001 et seq.);
- (4) Bonds or notes secured by mortgages or deeds of trust guaranteed or insured by the Federal Housing Administrator, or debentures issued by such administrator, under the terms of an act of Congress of the United States of June 27, 1934, entitled the "National Housing Act" as heretofore or hereafter amended (12 U.S.C.A. § 1701 et seq.);
- (5) Bonds of the state of Missouri;
- (6) Bonds of a city, county or school district of the state of Missouri;
- (7) Accounts of any savings and loan association chartered by the United States of America or any state which are insured by the Federal Savings and Loan Insurance Corporation;
- (8) Any securities as permitted by laws of Missouri relating to the investment of the capital, reserve and surplus funds of life insurance companies or casualty insurance companies organized under the laws of Missouri. [Emphasis added.]

Section 169.630.2, RSMo 1978, which is applicable to The Nonteacher School Employee Retirement System of Missouri, states:

2. The board shall invest all funds under its control which are in excess of a safe operating balance. The investment shall be made only in securities authorized for investment by section 169.040.

The issues involved in your first question are (1) can life or casualty insurance companies invest their capital, reserve and surplus funds in direct equity ownership of real property for in-

vestment purposes, and (2) if the answer to question (1) above is in the affirmative, are the instruments evidencing this direct equity ownership, e.g., a contract of sale and warranty deed, "securities" for purposes of Sections 169.040.2(8) and 169.630.2, RSMo 1978.

Section 375.330.1(7), RSMo Supp. 1982, states:

1. No insurance company formed under the laws of this state shall be permitted to purchase, hold or convey real estate, excepting for the purpose and in the manner herein set forth, to wit:

* * *

(7) Such real estate, or any interest therein, as may be acquired or held by it by purchase, lease or otherwise, as an investment for the production of income, which real estate or interest therein may thereafter be held, improved, developed, maintained, managed, leased, sold or conveyed by it as real estate necessary and proper for carrying on its legitimate business. [Emphasis added.]

See also Section 376.300.1(11), RSMo Supp. 1982.

Under Section 375.330.1(7), RSMo Supp. 1982, insurance companies may acquire real estate or any interest therein as an investment for the production of income.

The issue then turns to whether the documents evidencing the land transfer, e.g., a contract of sale and warranty deed, are "securities" for purposes of Sections 169.040.2(8) and 169.630.2, RSMo 1978. The General Assembly has not provided a definition of the word "security," as used in these statutes, but has provided definitions of the word "security" in other statutes.¹ In Florida Realty, Inc., v. Kirkpatrick, 509 S.W.2d 114 (Mo. 1974), Florida

¹ Section 400.8-102(1)(a)(i) to (iv), RSMo 1978, states:

(1) In this article unless the context otherwise requires

(a) A "security" is an instrument which

(i) is issued in bearer or registered form; and

(ii) is of a type commonly dealt in upon securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

Realty, Inc., proposed to act as agent for General Development Corporation, the owner of certain Florida land, to sell homesites in Florida to Missouri residents. These land sales were evidenced by an instrument denominated Acceptance & Guarantee Purchase Agreement (hereinafter "A & G"). The A & G provided for an "installment" sale of land whereby General Development Corporation retained possession and use of the property until the purchase price was paid in full and the warranty deed was delivered to the purchaser.

In holding that installment contracts or deferred payment plans were a security for purposes of Section 409.401(l), as en-

¹(continued)

(iii) is either one of a class or series or by its terms is divisible into a class or series of instruments; and

(iv) evidences a share, participation or other interest in property or in an enterprise or evidences an obligation of the issuer. [Emphasis in original.]

Section 409.401(l), RSMo 1978, states:

When used in this act, unless the context otherwise requires:

* * *

(1) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; limited partnership interest; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or any contract or bond for the sale of any interest in real estate on deferred payments or on installment plans when such real estate is not situated in this state or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money either in a lump sum or periodically for life or for some other specified period. [Emphasis added in part.]

acted by S.B. 99, 1967 Mo. Laws 611, the court distinguished documents evidencing an installment purchase from a direct cash sale by stating at 509 S.W.2d at 119:

A cash sale ordinarily results in the execution of a warranty deed or other conveyance transferring title to the land at the time the consideration is paid. A cash sale could not in any sense be construed as a security transaction, such as that represented by an A & G, which is a contractual agreement providing for the eventual transfer of land, years later, after the completion of payment of the full purchase price, the expiration of the agreed time period, and the completion of agreed-to improvements. There is a reasonable basis for regulating A & G's as securities, and in not regulating cash sales which by their very nature are not "securities." [Emphasis added.]

Accordingly, the documents evidencing a cash sale of land cannot be considered a "security."

The second question asked involves pooled real estate investment funds. It is our information that the type of pooled real estate investment funds contemplated are accounts held by insurance companies. The investor purchases units in this account pursuant to contract, and the insurance company invests the moneys in this account in a diversified portfolio of real estate. The investor may redeem his units at certain specified times, and any profit or loss on the account is shared on a pro-rated basis based on the number of units owned.

In answering this question, we again engage in a two-part analysis to determine (1) whether life or casualty insurance companies can invest their capital, reserve and surplus funds in pooled real estate investment funds offered by insurance companies, and (2) if the answer to (1) above is in the affirmative, whether the contracts evidencing the investment in the real estate investment fund are a "security" for purposes of Section 169.040.2(8) and 160.630.2, RSMO 1978.

Section 376.307, RSMo Supp. 1982, states:

1. Notwithstanding any direct or implied prohibitions in chapter 375 or 376, RSMo, the capital, reserve and surplus funds of all life insurance companies of whatever kind and character organized or doing business under chapter 375 or 376, RSMo, may be invested in any investments which do not otherwise qualify under any other provision of chapter 375 or 376, RSMo, provided, however, the investments authorized by this section are not eligible for deposit with the division of insurance, department of consumer affairs, regulation and licensing and shall be subject to all the limitations set forth in subsection 2.

2. No such life insurance company shall invest in such investments in an amount in excess of the following limitations, to be based upon its admitted assets, capital and surplus as shown in its last annual statement preceding the date of the acquisition of such investment, all as filed with the director of the division of insurance of the state of Missouri:

(1) The aggregate amount of all such investments under this section shall not exceed the lesser of (a) eight percent of its admitted assets or (b) the amount of its capital and surplus in excess of nine hundred thousand dollars; and

(2) The amount of any one such investment under this section shall not exceed one percent of its admitted assets.

3. If, subsequent to its acquisition hereunder, any such investment shall become specifically authorized or permitted under any other section contained in chapter 375 or 376, RSMo, any such company may thereafter consider such investment as held under such other applicable section and not under this section.

Finding no specific reference to life insurance company investments in pooled real estate investment funds, we conclude that Section 376.307, RSMO Supp. 1982, applies and that life insurance companies may invest in such pooled real estate investment funds, provided that the limitations in subsection 2 of that statute are met. We understand that "admitted" assets are merely the assets of the retirement system.

We also believe the contracts evidencing an investment in pooled real estate investment funds are "investment contracts," so as to qualify as "securities." See Section 409.401(1), RSMo 1978, quoted at note 1, supra.

CONCLUSIONS

It is the opinion of this office that the Board of Trustees that administers The Public School Retirement System of Missouri and The Non-Teacher School Employee Retirement System of Missouri may not invest funds of these systems in direct equity ownership of real property for the purpose of producing income, and that such board may invest funds of these systems in pooled real estate investment funds for the purpose of producing income.

Very truly yours,


JOHN ASHCROFT
Attorney General

COUNTY BUILDINGS:
COUNTY COURTS:
COUNTY LEASES:
COUNTY OFFICES:

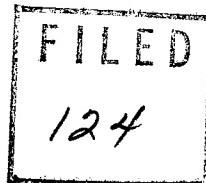
lease such property to a private individual or corporation for its fair market value, if such lease will not interfere with the public use of this property.

The Boone County Court may purchase land which will serve as the site of a building to house county officeholders. The Boone County Court may temporarily

July 7, 1983

OPINION NO. 124-83

The Honorable Joe Moseley
Boone County Prosecuting Attorney
Boone County Courthouse
Columbia, Missouri 65201



Dear Mr. Moseley:

You have requested an opinion of this office on the following questions:

- 1) Can the County of Boone buy real estate for the purpose of constructing a building to house county officeholders?
- 2) Can the County of Boone lease the above purchased property to a private individual or corporation during the interim between the purchase and construction [sic] of the building?

We understand that the building contemplated would be in addition to both the Boone County Courthouse and the Daniel Boone (County-City) Building.

Section 49.510, RSMo 1978,^{1/} states:

It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the

^{1/}All statutory references are to RSMo 1978, unless otherwise indicated.

The Honorable Joe Moseley

duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct.

Section 49.270 states:

The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county.

Section 49.470 states:

The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage.

Section 49.370 states:

The county court shall designate the place whereon to erect any county building, on any land belonging to such county, at the established seat of justice thereof.

In Opinion No. 237, Parker, 1968, we interpreted Sections 49.510 and 49.270, RSMo 1959, as granting Boone County the "authority to purchase or construct a building to be used by the county for administrative offices . . ." Id., at 3. Included in this is the authority "to purchase . . . any property, real or personal, for the use and benefit of the county; . . ." Section 49.270. Therefore, Boone County, and more specifically the Boone County Court, has the authority to purchase a building to house

The Honorable Joe Moseley

county officeholders. We note that Boone County may not violate the constitutional debt limitations, Article VI, Sections 26(a)-(f), Missouri Constitution, when purchasing this land. We also note that there may be applicable bidding or other procedures, which we will discuss with you upon your request.

In response to your second question, we note that with exceptions not relevant here, Article VI, Sections 23 and 25, Missouri Constitution, prohibit counties from granting public property and things of value to corporations and individuals. Therefore, we assume for purposes of this opinion that the lease you have in mind is one for the fair market value of the property, so that there is no grant of public property to the lessee.

We find no specific statute authorizing a second class county to lease its property. Cf. Section 49.287 (applicable to first class, noncharter counties). However, Section 49.270 grants county courts the authority to control and manage county property. In Opinion No. 92, Volkmer, 1961, we interpreted the "control and management" language of Section 49.270, RSMo 1959, as impliedly granting county courts the authority to lease property^{2/} to private entities for short periods of time. The lease may not interfere with the public use of the property. See, Opinion Letter No. 5, Wessel, 1970. Therefore, Boone County may lease the property here under consideration to a private individual or corporation on a short-term basis for its fair market value, so long as the lease does not interfere with the public use of the property.

CONCLUSIONS

1. The Boone County Court may purchase land which will serve as the site of a building to house county officeholders.

2/ In Opinion No. 20, Curry, 1951, this office concluded that county courts do not have authority to lease space in the county courthouse to private entities.

We have indicated that an abstract company may be "charged" for the use of space, equipment, and the recorder of deeds' services in exercising its right to inspect and duplicate county records pursuant to Sections 109.180 and 109.190, RSMo. Opinion No. 55, Casey, 1978.

We have also indicated that a third class county may lease or provide courthouse space to certain quasi-governmental entities. Opinion No. 1, Pickett, 1979.

The Honorable Joe Moseley

2. The Boone County Court may temporarily lease such property to a private individual or corporation for its fair market value, if such lease will not interfere with the public use of this property.

Very truly yours,


JOHN ASHCROFT
Attorney General

CLEAN WATER COMMISSION:
DEPARTMENT OF NATURAL RESOURCES:
OIL & GAS COUNCIL:
PERMITS:
STATE GEOLOGIST:
WATER POLLUTION:
WATER SUPPLY:
WELLS:

Regulation 10 CSR
50-2.030 of the
Missouri Oil and Gas
Council provides ade-
quate time for public
participation proce-
dures to be completed.
The 15-day time period
prescribed by 10 CSR

50-2.030(9) is directory. Failure of the State Geologist to act upon a permit application within 15 days does not result in automatic issuance of a permit. Chapter 259, RSMo 1978, provides adequate authority for the promulgation of regulations by the Missouri Oil and Gas Council to prevent the movement of fluids into underground sources of drinking water.

July 11, 1983

OPINION NO. 127-83

Fred A. Lafser, Director
Department of Natural Resources
Post Office Box 176
Jefferson City, Missouri 65102



Dear Mr. Lafser:

You have requested an opinion of this office on the following two questions:

1. Does Regulation 10 CSR 50-2.030 of the Missouri Oil and Gas Council provide adequate time for public participation procedures to be completed and what consequences result if the State Geologist does not act upon a permit application within the 15-day time period prescribed by 10 CSR 50-2.030(9)?
2. Does Chapter 259, RSMo 1978, provide adequate authority for the promulgation of regulations by the Missouri Oil & Gas Council to prevent the movement of fluids into underground sources of drinking water?

Fred A. Lafser

We understand that the questions that you submitted were in response to a request by the Environmental Protection Agency for further clarification of matters contained in our Opinion Letter 63-82, and our Addendum to Opinion Letter No. 63-82. What follows is intended to supplement those two opinions. All statutory references are to the Revised Statutes of Missouri (RSMo 1978), unless otherwise indicated. All regulatory references are to the Code of State Regulations (CSR).

1. Missouri Oil and Gas Council Regulation 10 CSR 50-2.030 provides adequate time to complete public participation procedures. In addition, the 15-day time period prescribed in 10 CSR 50-2.030(9) for permit review by the State Geologist is a directory, not a mandatory, provision and the failure to act upon a permit application within the 15-day period does not result in automatic issuance of the permit.

Citation of Laws and Regulations

10 CSR 50-2.030

Hedges v. Department of Social Services,
585 S.W.2d 170 (Mo.App., W.D. 1979)

Explanation of Authority

Two provisions in Regulation 10 CSR 50-2.030 govern the permit application procedures for injection wells. Paragraph 5 applies only to injection wells and requires the applicant for an injection well permit to publish notice of the proposed application in a newspaper of general circulation in the county in which the proposed injection well will be located. A 15-day written comment period follows the publication. If the State Geologist determines from the comments received that a significant degree of public interest is expressed, then he may order a public hearing to be held no sooner than 30 days after notice is given. If no public hearing is ordered, then the application will be processed without further delay.

Paragraph 9 of 10 CSR 50-2.030 applies to permit applications for all oil and gas wells, including injection wells. It provides that upon application the State Geologist shall review the application and within 15 days determine if the application is in proper form and if the requirements of the law and the regulations are met. If the State Geologist determines that the application is not in proper form, or that the laws or the regulations are not being met, he shall deny the permit.

The question raised by the Environmental Protection Agency concerns when the 15-day review period provided for in paragraph 9 begins. Reading paragraphs 5 and 9 of 10 CSR 50-2.030 together, we conclude that the 15-day review period in paragraph 9 is not trig-

gered until the notice, comment, and public hearing requirements of paragraph 5 have been satisfied. Paragraph 9 requires the State Geologist to deny a permit if he determines that the application is not in proper form or that the requirements of the law or regulations have not been met. Therefore, any injection well application which has not satisfied the notice, comment, and public hearing requirements of paragraph 5 would have to be denied, because the requirements of a regulation have not been met. We interpret paragraph 9 to mean that the State Geologist has 15 days to issue or deny an injection well permit upon receipt of a completed application, i.e., one that has satisfied the notice, comment and public hearing requirements of paragraph 5. This construction ensures that no permit can be granted unless the public participation provisions have been completed and it also provides adequate time for review of the permit application by the State Geologist.

A question has also been raised as to whether the failure of the State Geologist to act upon a permit application within the 15-day period prescribed by 10 CSR 50-2.030(9) results in the automatic issuance of the permit. We conclude that it does not. In Hedges v. Department of Social Services, 585 S.W.2d 170 (Mo.App., W.D. 1979), the plaintiff sought an appeal to the Personnel Advisory Board in regard to his termination as an investigator for the Missouri Department of Social Services. His right to appeal depended upon his employment status, i.e., "regular" employees could seek appeal, but "probationary" employees could not. The plaintiff maintained that he had become a regular employee by virtue of the failure of the director of the Department of Social Services to comply with Regulation 1 CSR 20-3.040(2), which provided:

When an extension [of probationary status] has been approved by the director, the appointing authority shall notify the employee in writing of the extension and the reasons therefor.

The plaintiff argued that the failure of the director to notify him of his continued probationary status automatically granted him the status of a regular employee and, therefore, entitled him to appeal his termination.

The court rejected this argument and ruled that the plaintiff had never become a regular employee, stating that where a statute or regulation merely requires that certain things be done without prescribing the results that shall follow if they are not done, then the statute or regulation is directory rather than mandatory. Id. at 172. The regulation in question here, 10 CSR 50-2.030(9), provides merely that the State Geologist shall review the application within 15 days, but is silent as to the consequences of the failure of the State Geologist to act within that time. Therefore, under the Hedges case, we conclude that this provision is directory rather than mandatory, and that no permit will automatically issue upon the failure of the State Geologist to act upon it within 15 days.

2. Chapter 259 gives the Missouri Oil and Gas Council the authority to promulgate regulations to prevent the migration of fluids into underground sources of drinking water.

Citation of Laws and Regulations

Section 259.070

Explanation of Authority

Section 259.070 clearly provides the Missouri Oil and Gas Council with the Authority to promulgate regulations to prevent the migration of fluids into underground sources of drinking water. Section 259.070(2) gives the Missouri Oil and Gas Council the power to regulate by rule:

* * *

(a) The drilling, producing, and plugging of wells, and all other operations for the production of oil or gas;

(b) The shooting and chemical treatment of wells;

* * *

(d) Operations to increase ultimate recovery such as cycling of gas, the maintenance of pressure, and the introduction of gas, water, or other substances into producing formations; and

(e) Disposal of highly mineralized water or oil field wastes; [Emphasis added.]

Section 259.070(1)(e) gives the council the authority to require:

The drilling, casing, operation, and plugging of wells in such manner as to prevent the escape of oil or gas out of one stratum into another; the intrusion of water into oil or gas stratum; the pollution of fresh water supplies by oil, gas, or highly mineralized water; . . . [Emphasis added.]

Section 259.070(5) also gives the council the authority:

(5) To promulgate and to enforce rules, regulations, and orders to effectuate the purposes and the intent of this chapter;

Fred A. Lafser

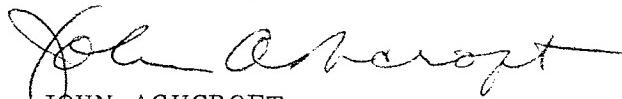
These provisions clearly give plenary power to the Missouri Oil and Gas Council to regulate the operation of oil and gas wells. Furthermore, Section 259.070(1) specifically empowers the council to require that the operation of wells is conducted so as to prevent the pollution of fresh water supplies. Given these provisions, the Missouri Oil and Gas Council plainly has the authority to promulgate regulations that require that injection well operations be conducted so as to prevent the migration of fluids into underground sources of drinking water.

CONCLUSION

It is the opinion of this office that Regulation 10 CSR 50-2.030 of the Missouri Oil and Gas Council provides adequate time for public participation procedures to be completed. The 15-day time period prescribed by 10 CSR 50-2.030(9) is directory. Failure of the State Geologist to act upon a permit application within 15 days does not result in automatic issuance of a permit. Chapter 259, RSMo 1978, provides adequate authority for the promulgation of regulations by the Missouri Oil and Gas Council to prevent the movement of fluids into underground sources of drinking water.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kirk Lohman.

Very truly yours,


JOHN ASHCROFT
Attorney General

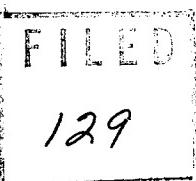
INDUSTRIAL DEVELOPMENT:
INDUSTRIAL DEVELOPMENT BONDS:
INDUSTRIAL DEVELOPMENT PROJECTS:
INDUSTRIAL FACILITIES:
NON-PROFIT CORPORATIONS:
NON-PROFIT ORGANIZATIONS:
facilities do not come within the definition of the word "project" in Section 349.010(4), RSMo Supp. 1982.

Non-profit retirement facilities do not come within the definition of the word "project" in Section 100.255(5), RSMo Supp. 1982; and non-profit retirement

October 6, 1983

OPINION NO. 129-83

The Honorable James R. Strong
Senator, District 6
State Capitol, Room 417
Jefferson City, Missouri 65101



Dear Senator Strong:

This is in response to your request for an opinion of this office on the following questions:

All questions pertain to Chapter 349.010 RSMo,
"Industrial Development Funding Act" [sic]

1. Under section 2, paragraph 2(f): can a non-profit retirement facility be defined as an "industrial development corporation" under the given definitions?
2. Under section 10, paragraph (4), if a non-profit retirement facility is licensed by the State of Missouri, is a legal 501C3 corporation, and is licensed to do business in the state of Missouri, is it included in the definition of a "commercial facility"?

The Industrial Development Funding Act (hereinafter sometimes referred to as "Act") originated as C.C.S.S.B. 681, 1982 Mo. Laws 266, and is now codified at Sections 100.250 to 100.295, RSMo Supp. 1982.

In answer to your first question, section 2, paragraph (2)(f) of the Act is now codified at Section 100.255(2)(f), RSMo Supp. 1982, which states:

The Honorable James R. Strong

As used in sections 100.250 to 100.295, unless the context clearly requires otherwise, the following terms shall mean:

. . . ;

(2) "Development agency", any of the following:

. . . ;

(f) An industrial development corporation established pursuant to sections 349.010 to 349.100, RSMo; [Emphasis in original and revisor's note omitted.]

Although you do not specifically state how the non-profit retirement facility is incorporated, a not for profit corporation incorporated under Chapters 352 or 355, RSMo 1978 and Supp. 1982, cannot be an industrial development corporation incorporated under Chapter 349, RSMo 1978 and Supp. 1982.

We view your first question as asking whether a "non-profit retirement facility" can be a "project" under Section 100.255(5), RSMo Supp. 1982, which defines the word "project" as:

[T]he purchase, construction, extension, and improvement of real estate, plants, buildings, structures or facilities, used or to be used as a factory, assembly plant, manufacturing plant, fabricating plant, distribution center, warehouse building, port terminal or facility, transportation and transfer facility, or industrial plant. The term "project" shall also include any required improvements, including, but not limited to, road or rail construction, alteration or relocation, and construction of facilities to provide utility service for any of the facilities defined as a project under this subdivision, along with any fixtures, equipment, and machinery, and any demolition and relocation expenses required in connection with any such projects. [Emphasis in original.]

It is the opinion of this office that non-profit retirement facilities do not, under this definition, come within the scope of the term "project".

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C.C.S.S.B. 681 also enacted Section 349.010, RSMo Supp. 1982. We view your second question as asking whether a non-profit retirement facility, licensed by the State of Missouri and tax-exempt under I.R.C. Section 501(c)(3), is a "commercial facility" as that phrase is used in the definition of the word "project" in Section 349.010(4), RSMo Supp. 1982. That statute states:

"Project" means the purchase, construction, extension and improvement of plants, buildings, structures, or facilities, whether or not now in existence, including the real estate, used or to be used as a factory, assembly plant, manufacturing plant, processing plant, fabricating plant, distribution center, warehouse building, waterborne vessels excepting commercial passenger vessels for hire in a city not within a county built prior to 1950, office building, for profit or not for profit hospital, commercial or agricultural facility, or facilities for the prevention, reduction or control of pollution. Included in all of the above shall be any required fixtures, equipment and machinery. Excluded are facilities designed for the sale or distribution to the public of electricity, gas, water or telephone, together with any other facilities for cable television and those commonly classified as public utilities. Projects of a municipal authority must be located wholly within the incorporated limits of the municipality except that such projects may be located outside the corporate limits of such municipality and within the county in which the municipality is located with permission of the governing body of the county. Projects of a county authority must be located within an unincorporated area of such county except that such projects may be located within the incorporated limits of a municipality within such county, when approved by the governing body of the municipality. [Emphasis added in part.]

Senate Bill No. 298, First Regular Session, 82nd General Assembly, failed to pass. This bill would have interjected the words "not for profit nursing or retirement facility or combination thereof" between the phrase "for profit or not for profit hospital" and the phrase "commercial or agricultural facility" in Section 349.010(4), RSMo Supp. 1982. Rejection of Senate Bill No. 298 shows a legislative intent not to include retirement facilities within the scope of the definition of the word "project" in

The Honorable James R. Strong

Section 349.010(4), RSMo Supp. 1982. In light of the rejection of Senate Bill No. 298, this office cannot circumvent this action of the General Assembly by concluding that non-profit retirement facilities are commercial facilities.

CONCLUSIONS

It is the opinion of this office that:

- (1) Non-profit retirement facilities do not come within the definition of the word "project" in Section 100.255(5), RSMo Supp. 1982; and
- (2) non-profit retirement facilities do not come within the definition of the word "project" in Section 349.010(4), RSMo Supp. 1982.

Very truly yours,


JOHN ASHCROFT
Attorney General

DRIVER'S LICENSE:
DRIVER'S LICENSE REVOCATION:
DRIVING WHILE INTOXICATED:
DEPARTMENT OF REVENUE:
MOTOR VEHICLES:

The verified report described in Section 4 of C.C.S.H.C.S. S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session) is required only when the arresting officer describes the offense charged as a violation of Sections 577.010 or 577.012, RSMo 1978, that, pursuant to Section 3.1 of C.C.S.H.C.S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session) the department of revenue may not suspend the driver's license of a person based on the report of an arresting officer who describes the offense charged as a violation of county or municipal ordinance, and that the provisions of Section 577.023.13 [as amended by C.C.S.H.C.S.C.S.S.B. Nos. 318 and 135, (82nd General Assembly, 1st Regular Session)] do not prohibit a county or municipality from enacting an ordinance providing for enhanced punishment for a conviction of driving while intoxicated when the person charged has a prior municipal or county conviction for a similar offense.

September 6, 1983

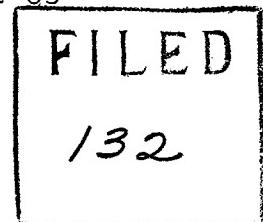
OPINION NO. 132-83

The Honorable Vernon E. Scoville
Representative, 45th District
8710 East 11th Street
Kansas City, Missouri 64134

Dear Representative Scoville:

This opinion is in response to your request for an opinion as follows:

1. Does the language of Section 4.1 of C.C.S.H.C.S.C.S.S.B. Nos. 318 and 135, 1st Reg. Sess., 82nd G.A. (page 12, lines 1-12 of the Conference Committee Substitute), mean that the submission of the verified report is only required for violations of sections 577.010 and 577.012?



The Honorable Vernon E. Scoville

2. Does the section mentioned above preclude submission of verified reports for county and municipal violations for driving while intoxicated or driving with excessive blood alcohol content?

3. Does Section 3.2 of the above-mentioned act (page 11, lines 9-15) require the Department of Revenue to consider only the reports mentioned in questions 2 and 3 above?

4. Does Section 577.023.13 of this act (page 8, lines 84-87) preclude a county or municipality from enhancing a driving while intoxicated conviction if the previous conviction was for driving while intoxicated?

The principle task of statutory construction is to seek the intent of the legislature. *Breeze v. Goldberg*, 595 S.W.2d 381 (Mo. App. 1980); *Schimmer v. H. W. Freeman Const. Co., Inc.*, 607 S.W.2d 767 (Mo. App. 1980). In so doing, we are given direction by the canons of construction adopted by the courts of this state: Legislative intent must be ascertained by examining the plain language of the statute viewed as a whole. *Staley v. Missouri Director of Revenue*, 623 S.W.2d 246 (Mo. banc 1981). Irrespective of what the legislature may have intended, we must look to the express language of the law to determine its meaning. *State ex rel. DeGraffenreid v. Keet*, 619 S.W.2d 873 (Mo. App. 1981); *Schimmer, supra*; *Biermann v. Biermann*, 584 S.W.2d 106 (Mo. App. 1979). When the words of a statute are ambiguous, it is proper to consider the history of the legislation, an inquiry which may require an examination of the original bill as filed. *State ex rel. Zoological Park Subdistrict of the City and County of St. Louis v. Jordan*, 521 S.W.2d 369 (Mo. 1975); *State ex rel. Danforth v. European Health Spa, Inc.*, 611 S.W.2d 259 (Mo. App. 1980). But, when the language of a statute is unambiguous, there is no room for construction since the legislature will be presumed to have said exactly what it intended. *DePoortere v. Commercial Credit Corp.*, 500 S.W.2d 724 (Mo. App. 1973); *State ex rel. DeGraffenreid v. Keet, supra*. It is with these guideposts before us that we render this opinion.

As finally passed C.C.S.H.C.S.S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session) (hereafter S.B. 318), instructs the Department of Revenue to:

[S]uspend the license of any person upon its determination that the person was arrested upon probable cause to believe he was driving a motor vehicle while the alcohol

The Honorable Vernon E. Scoville

concentration in the person's blood or breath
was thirteen hundredths of one percent
Id. Section 3.1

The Department of Revenue is to make a determination as to whether
a person was driving a motor vehicle with a thirteen-hundredths of
one-percent blood alcohol content "on the basis of the report of a
law enforcement officer required in section 4 of this act, . . ."
Id., Section 3.2.

Section 4.1, S.B. 318, provides:

A law enforcement officer who arrests any
person for a violation of section 577.010 or
577.012, RSMo, and in which the alcohol
concentration in the person's blood or breath
was thirteen hundredths of one percent or more
by weight, shall forward to the department a
verified report of all information relevant to
the enforcement action, including information
which adequately identifies the arrested
person, a statement of the officer's grounds
for belief that the person violated section
577.010 or 577.012, RSMo, a report of the
results of any chemical tests which were
conducted, and a copy of the citation and
complaint filed with the court. [Emphasis
added].

The General Assembly passed S.B. 318 only after considerable
debate and amendment. The truly agreed to and finally passed
version was a conference committee substitute for a house
committee substitute for a senate committee substitute for the
bill as originally filed as Senate Bill Nos. 318 and 135. The
original versions of the bills did not contain the language found
in Section 4.1, quoted in full above; section 4.1 was added by
the senate committee. Following the senate committee amendments,
the house committee deleted Section 4.1 in favor of the following
language:

2.(a) If a person arrested with probable
cause to believe that the person was driving
while intoxicated has an alcohol concentration
in blood or breath of fifteen hundredths of
one percent (.15) . . . as shown by the sworn
report of the arresting officer to the
department of revenue, the department may
suspend the license of such person
The department shall make a determination of
these facts on the basis of a verified report
of the arresting officer setting forth the

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facts establishing probable cause for the arrest of the licensee and establishing the alcohol concentration in the person's blood or breath. . . . H.C.S.S.C.S.S.B. 318 & 135, Section 3.2(a)

The conference committee accepted the senate committee version -- a version which is much more strict in its language and which, unlike the general arrest provisions of the house committee language, makes specific reference to violations of Sections 577.010 and 577.012.

Comparing the truly agreed to and finally passed version with the house committee substitute, which was not adopted, we are led to the conclusion that the General Assembly rejected the broad language of the house committee, which would have provided a suspension mechanism for all arrests based on probable cause to believe a person was operating a vehicle while under the influence of alcohol with a blood alcohol content of fifteen-hundredths, irrespective of the legal basis for the arrest -- be it state statute or county or municipal ordinance -- in favor of language limiting its applicability to arrests based on violations of state law. Given this clear choice by the legislature, it is our conclusion that the language of Section 4 is not ambiguous. Consistent with the rules of statutory construction to which we earlier referred, there is no room for statutory construction. We are confined to the plain meaning of the language employed by the legislature. See, DePoortere v. Commercial Credit Corp., *supra*; State ex rel. DeGraffenreid v. Keete, *supra*; and Schimmer v. H. W. Freeman Const. Co., Inc., *supra*.

We note that S.B. 318 amends Section 577.037.5 to read as follows:

Any charge alleging a violation of section 577.010 or 577.012 or any county or municipal ordinance prohibiting driving while intoxicated [Emphasis added]

The adoption of this language by the General Assembly in the same bill indicates that where the legislature intended to do so, it expressly included references to county and municipal ordinance violations. The absence of this language in Section 4 is, in our opinion, significant.

In answer to your first question, and for the reasons we have expressed, it is our opinion that the verified report described in Section 4 of S.B. 318 is required only when the arresting officer describes the offense charged as a violation of Section 577.010 or 577.012. See, Rule 37.09 V.A.M.R.

The Honorable Vernon E. Scoville

Your second and third questions are more clearly stated if combined and asked as follows:

Can the Department of Revenue administratively revoke a person's driver's license based on a verified report filed by an arresting officer who describes the offense charged as a county or municipal violation?

Section 3.2 of S.B. 318 provides in pertinent part:

The department [of revenue] shall make a determination of these facts [that the person was arrested upon probable cause to believe he was driving a motor vehicle while the alcohol concentration in the persons' blood or breath was thirteen hundredths of one percent or more . . . Section 3.1, S.B. 318] on the basis of the report of the law enforcement officer required in section 4 of this act. . . .
[Emphasis added.]

We find no ambiguity in Section 3.2. The department is permitted to base its factual determination on the required report. In our answer to your first question, we opined that a report is required only where the arresting officer describes the offense charged as a violation of Sections 577.010 or 577.012. Because a report filed with the department based on a county or municipal ordinance violation is not a required report, it is our opinion that the department may not invoke the sanctions of S.B. 318 based on such a report.

Again, the canons of construction compel our conclusion. We must presume that the words "required in section 4 are not idle verbiage. *State ex rel. Ashcroft v. City of Sedalia*, 629 S.W.2d 578 (Mo. App. 1981); *Stanley v. Missouri Director of Revenue, supra*; *In Re Tomkins' Estate*, 341 S.W.2d 866 (Mo. 1960). Further, when a statute expressly prescribes a procedure, it "includes in the power granted the negative that it cannot be otherwise done. . . ." *State v. County of Camden*, 394 S.W.2d 71, 77 (Mo. App. 1965).

We turn now to your fourth question. In Missouri, a municipal ordinance may go further than its state statute provided the ordinance does not attempt to authorize what the legislature has forbidden and unless the state statute is preclusive. *City of Kansas City v. LaRose*, 524 S.W.2d 112 (Mo. banc 1975). *State ex rel Hewlett v. Womach*, 355 Mo. 486, 196 S.W.2d 809 (banc 1946).

Section 577.023.13 as amended by S.B. 318, provides in pertinent part:

The Honorable Vernon E. Scoville

A conviction of a violation of a municipal or county ordinance in a county or municipal court for driving while intoxicated or a conviction or a plea of guilty or a finding of guilty followed by a suspended imposition of sentence, suspended execution of sentence, probation or parole or any combination thereof in a state court shall be treated as a prior conviction; except that no conviction of a violation of a municipal or county ordinance in a municipal or county court may be used to enhance a term of imprisonment in any subsequent proceeding.

Section 577.023.13 cannot be read in a vacuum. Section 577.023 read in its entirety, carefully establishes a procedure for enhancing the punishment of a person who is a "prior offender" or a "persistent offender" (as these are defined by Section 577.023.1, S.B.318) upon a plea of guilty or a conviction "of a violation of Section 577.010 or 577.012". Sections 577.023.2 and 577.023.3. After establishing a statutory procedure for hearing evidence of prior convictions, subsection 13 prohibits the use of county or municipal ordinance violations to enhance a term of imprisonment. The entire focus of Section 577.023 is on a violation of Sections 577.010 or 577.012. For this reason, and because Section 577.023.10 expressly contemplates the state and not the county or a municipality being heard at the sentencing hearing, we believe that the proceedings to which Section 577.023 applies are proceedings in state court in which a person is charged with a violation of Sections 577.010 and 577.012. It is, therefore, our opinion that the provisions of Section 577.023.13 do not prohibit a county or municipal ordinance from providing for an enhanced punishment for a conviction of driving while intoxicated when the person convicted has a prior county or municipal ordinance conviction for a similar offense.

As always in these opinions, we seek to analyze the law and decide the issues presented as would a court faced with a similar legal question. Yet this opinion deserves -- and has received -- special attention. Drunk driving is a plague on our society. Our streets and highways are stained with innocent blood.

Regrettably, our opinion holds that S.B. 318 does not address the drunk driving problem as completely as it might. Had Section 4.1 of S.B. 318 read:

The Honorable Vernon E. Scoville

A law enforcement officer who arrests any person for a violation of section 577.010 or 577.012, RSMo or for a violation of any county or municipal ordinance prohibiting driving while intoxicated. . . ,

this opinion would have reached a much different result. We call on the legislature to adopt corrective legislation at the earliest possible date.

CONCLUSION

It is the opinion of this office that the verified report described in Section 4 of C.C.S.H.C.S.S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session) is required only when the arresting officer describes the offense charged as a violation of Sections 577.010 or 577.012, RSMo 1978, that, pursuant to Section 3.1 of C.C.S.H.C.S.S.C.S.S.B. Nos. 318 and 135 (82nd General Assembly, 1st Regular Session), the department of revenue may not suspend the driver's license of a person based on the report of an arresting officer who describes the offense charged as a violation of county or municipal ordinance, and that the provisions of Section 577.023.13 [as amended by C.C.S.H.C.S.S.C.S.S.B. Nos. 318 and 135, (82nd General Assembly, 1st Regular Session)] do not prohibit a county or municipality from enacting an ordinance providing for enhanced punishment for a conviction of driving while intoxicated when the person charged has a prior municipal or county conviction for a similar offense.

Very truly yours,



JOHN ASHCROFT
Attorney General

CHILD PASSENGER RESTRAINT SYSTEMS:
DEPARTMENT OF PUBLIC SAFETY:
MOTOR VEHICLE EQUIPMENT:
MOTOR VEHICLES:
SCHOOL TRANSPORTATION:

House Bill No. 29,
First Regular Session,
82nd General Assembly,
does not require the
installation of seat
belts or child passenger
restraint systems
in school buses.

September 30, 1983

OPINION NO. 136-83

Edward D. Daniel, Director
Department of Public Safety
621 East Capitol
Jefferson City, Missouri 65102-0749

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136

Dear Mr. Daniel:

This is in response to your request for an official opinion of this office on the following questions:

- a. Do the provisions of House Bill No. 29, enacted by the 82nd General Assembly relating to child passenger restraint systems, apply to children being transported on school buses?
- b. In the event school buses are required to install seat belts for children under the age of four years, does Article X, Section 21 of the Missouri Constitution affect this legislation?

As we understand your first question, you are concerned with children under four years of age who are transported to preschool programs on school buses. See, e.g., Section 162.700, RSMo 1978 (handicapped children preschool program). Section 302.010(15), RSMo Supp. 1982,^{1/} states:

1/

Section 301.010(27), RSMo Supp. 1982, defines the term "school bus" as "any motor vehicle used solely to transport students to or from school or to transport students to or from any place for educational purposes;".

Edward D. Daniel, Director

The term "school bus", when used in this chapter [a chapter dealing with drivers' and chauffeurs' licenses], means any motor vehicle, either publicly or privately owned, used to transport students to and from school, or to transport pupils properly chaperoned to and from any place within the state for educational purposes. [Emphasis in original.]

House Bill No. 29, First Regular Session, 82nd General Assembly (hereinafter sometimes referred to as "H.B. 29"), states:

Section 1. After January 1, 1984, every person transporting a child under the age of four years residing in this state shall be responsible, when transporting such child in a motor vehicle operated by that person on the streets or highways of this state, for providing for the protection of such child. When traveling in the front seat of a motor vehicle the child shall be protected by a child passenger restraint system approved by the department of public safety. When traveling in the rear seat of a motor vehicle the child shall be protected by either a child passenger restraint system approved by the department of public safety or the vehicle's seat belt. When the number of child passengers exceeds the number of available passenger positions, and all passenger positions are in use, remaining children shall be transported in the rear seat of the motor vehicle. The provisions of this act shall not apply to motor vehicles registered in another state, or to a temporary substitute vehicle.

2. Any person who violates this section is guilty of an infraction and, upon conviction, may be punished by a fine of not more than twenty-five dollars and court costs.

3. The provisions of this act shall not apply to any public carrier for hire.

Section 2. In no event shall failure to employ a child passenger restraint system required by section 1 of this act, provide the basis for a claim of criminal or civil liability or negligence or contributory negligence of any person in any action for damages by reason of injury sustained by a child; nor shall such

Edward D. Daniel, Director

failure to employ such child passenger restraint system be admissible as evidence in the trial of any civil or criminal action.

Section 3. The department of public safety shall initiate and develop a program of public information to develop understanding of, and insure compliance with the provisions of this act. The department of public safety shall, within thirty days of the effective date of this act, promulgate standards for the performance, design, and installation of passenger restraint systems for children under four years of age in accordance with federal motor vehicle safety standards and shall approve those systems which meet such standards. Any rule or portion of a rule promulgated pursuant to this Act may be suspended by the joint committee on administrative rules if after hearing thereon the committee finds that such rule or portion of the rule is beyond or contrary to the statutory authority of the agency which promulgated the rule, or is inconsistent with the legislative intent of the authorizing statute. The general assembly may reinstate such rule by concurrent resolution signed by the governor. [Emphasis added.]

First, Section 1.020.1(7), RSMo 1978, states:

1. As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

. . . ;

(7) The word "person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations; [Emphasis added in part.]

Section 1.1 of H.B. 29 applies to "every person transporting a child under the age of four years residing in this state . . . , when transporting such child in a motor vehicle operated by that person on the streets or highways of this state, . . ." (Emphasis added.)

A political body, such as a school district, or a corporate body, such as a private corporation that has contracted with a school district to provide school bus transportation services,

Edward D. Daniel, Director

cannot operate a motor vehicle, such as a school bus. In this instance, application of the definition of the word "person" in Section 1.020.1(7), RSMo 1978, is plainly repugnant to the context of that word as it appears in H.B. 29.

Assuming, *arguendo*, that H.B. 29 applies to school buses, the language of the statute would leave each individual school bus driver responsible for "providing for the protection of" the children being transported and chargeable with failing to provide such protection. Section 1.1 of H.B. 29. This would create severe economic disincentives for school bus drivers to transport children under four years of age to preschool programs. It cannot be presumed that the General Assembly intended such an improvident result.

Second, Section 1.1 of H.B. 29 specifies that a child shall be protected by a child passenger restraint system approved by the Department of Public Safety when traveling in the **front** seat of a motor vehicle, and that a child shall be protected either by a child passenger restraint system approved by the Department of Public Safety or the vehicle's seat belt when traveling in the **rear** seat of a motor vehicle. We believe this language indicates a legislative concern with passenger automobiles rather than with school buses, which have more than front and rear seats.

Third, Section 3 of H.B. 29 states in part:

The department of public safety shall, within thirty days of the effective date of this act, promulgate standards for the performance, design, and installation of passenger restraint systems for children under four years of age in accordance with federal motor vehicle safety standards . . . [Emphasis added.]

Motor Vehicle Safety Standard No. 222, 49 C.F.R. Section 571.222 (1982), relating to school bus safety and occupant crash protection, does not rely on safety belts and child restraint systems for safety. See 15 U.S.C. Section 1392(i) (1976). Subsection S4.4 of Motor Vehicle Safety Standard No. 208, 49 C.F.R. Section 571.208.S4.4 (1982) requires seat belts only in the driver's designated seating position for "buses" manufactured on or after January 1, 1972. Federal motor vehicle safety standards do not require seat belts and child passenger restraint systems in school buses. See Motor Vehicle Safety Standard No. 213, 49 C.F.R. Section 571.213 (1982) (a safety standard dealing with child restraint systems). Because the General Assembly has specifically incorporated federal motor vehicle safety standards into H.B. 29, it follows that H.B. 29 does not require child restraint systems or seat belts

Edward D. Daniel, Director

in school buses. Therefore, for the reasons expressed, we are of the opinion that H.B. 29 does not apply to persons transporting children in school buses.

Given our answer to your first question, it is readily apparent that the answer to your second question is "no".

CONCLUSION

It is the opinion of this office that House Bill No. 29, First Regular Session, 82nd General Assembly, does not require the installation of seat belts or child passenger restraint systems in school buses.

Very truly yours,

John Ashcroft
JOHN ASHCROFT
Attorney General

HEALTH SERVICES CORPORATIONS:
NOT-FOR-PROFIT CORPORATIONS:
DENTAL BOARD:
ELIGIBILITY TO OFFICE:
QUALIFICATION FOR OFFICE:

Missouri Dental Service, Inc., a not-for-profit corporation doing business as a health services corporation, is not a business enterprise for purposes of Section 332.021.2, RSMo Supp. 1982.

October 21, 1983

OPINION NO. 200-83

The Honorable John Bass
Senator, District 4
State Capitol, Room 419A
Jefferson City, Missouri 65101

Dear Senator Bass:

This is in response to your request for an opinion on the following questions:

- 1) Is a corporation organized under chapter 354, RSMo, considered a "business enterprise" as the term is used in section 332.021.2, RSMo Supp. 1982. 2) If Dental Services Inc. is so considered, does membership on the Dental Board and the Board of Directors of Dental Services constitute a violation of section 332.021.2, RSMo Supp. 1982.

The history of Missouri Dental Service, Inc., is stated as follows at pages 2 and 3 of the Division of Insurance Report of Examination as of December 31, 1982:

The inception of Missouri Dental Service, Inc. was in 1958 and it received a not-for-profit corporate charter from the Missouri Secretary of State in 1969. Application to do business as a Health Services Corporation was made and a certificate of authority was granted them in 1974 by the Missouri Division of Insurance. The Corporation continues to operate under Chapter 354 of the Revised Statutes of Missouri.



The Honorable John Bass

The original offices were in Jefferson City, Missouri and the present facilities have been occupied since 1975.

The Corporation has had a joint underwriting agreement with Blue Cross Hospital Services, Inc. since 1970. This document covers numerous areas of responsibility and service. In addition, it provides the guideline[s], subject to annual review, for the allocation of premiums, claims and expenses in the manner of a pooling agreement. Since 1981, Missouri Dental Service, Inc. has shared twenty percent of the underwriting income and underwriting deductions while Blue Cross Hospital Service participates at the rate of eighty percent. This agreement is currently being reviewed by both parties.

To provide dental service to the group subscribers, the Corporation enters into a formal agreement with eligible dentists willing to join. This agreement establishes the rights and liabilities and rules and regulations of this agency relationship and it may be cancelled by either party. The Corporation indicates that over 90% of the practicing dentists in Missouri participate.

The Corporation has become the claims processing center for the new Delta Dental Plan of Arkansas; additionally MDS provides underwriting, accounting and executive services on a reimbursed cost basis.

Section 354.025, RSMo 1978, states:

A health services corporation may be organized for the purposes of establishing and operating a voluntary, nonprofit plan or plans under which hospital care, medical-surgical care, and other health care and services, or reimbursement therefor, may be furnished to persons who become members or beneficiaries; of acting as agent or intermediary for other health services corporations, for any governmental body or agency, or for other corporations, associations, partnerships or individuals in the field of health care and services; and of research, education or related

The Honorable John Bass

activity to further objects within the purview of sections 354.010 to 354.175. [Emphasis added.]

Section 354.010, RSMo 1978, states in pertinent part:

As used in sections 354.010 to 354.175, unless the context clearly indicates otherwise, the following terms mean:

* * *

(3) "Health services", the health care and services provided by hospitals, or other health care institutions, organizations, associations or groups, and by doctors of medicine, osteopathy, dentistry, chiropractic, optometry and podiatry, nursing services, medical appliances, equipment and supplies, drugs, medicines, ambulance services, and other therapeutic services and supplies;

(4) "Health services corporation", any not for profit corporation heretofore or hereafter organized or operating for the purposes of establishing and operating a non-profit plan or plans under which prepaid hospital care, medical-surgical care and other health care and services, or reimbursement therefor, may be furnished to a member or beneficiary; [Emphasis added.]

Section 332.021.2, RSMo Supp. 1982, states:

Any person other than the public member appointed to the board as hereinafter provided shall be a dentist who is registered and currently licensed in Missouri, is a United States citizen, has been a resident of this state for one year immediately preceding his appointment, has practiced dentistry for at least five consecutive years immediately preceding his appointment, shall have graduated from an accredited dental school, and at the time of his appointment or during his tenure on the board has or shall have no connection with or interest in, directly or indirectly, any dental college, university, school, department, or other institution of learning wherein dentistry is taught, or with

The Honorable John Bass

any dental laboratory or other business enterprise directly related to the practice of dentistry. [Emphasis added.]

Section 332.071, RSMo 1978, states:

A person or other entity "practices dentistry" within the meaning of this chapter who:

(1) Undertakes to do or perform dental work or dental services or dental operations or oral surgery, by any means or methods, gratuitously or for a salary or fee or other reward, paid directly or indirectly to him or to any other person or entity;

(2) Diagnoses or professes to diagnose, prescribes for or professes to prescribe for, treats or professes to treat, any disease, pain, deformity, deficiency, injury or physical condition of human teeth or adjacent structures or treats or professes to treat any disease or disorder or lesions of the oral regions;

(3) Attempts to or does replace or restore a part or portion of a human tooth;

(4) Attempts to or does extract human teeth or attempts to or does correct malformations of human teeth or jaws;

(5) Attempts to or does adjust an appliance or appliances for use in or used in connection with malposed teeth in the human mouth;

(6) Interprets or professes to interpret or read dental radiographs;

(7) Administers an anesthetic in connection with dental services or dental operations or dental surgery;

(8) Attempts to or does perform or do any preventive, remedial, corrective, or restorative dentistry or dental service or dental operation in the human mouth;

(9) Undertakes to or does remove hard and soft deposits and stains from or polishes natural and restored surfaces of teeth;

(10) Uses or permits to be used for his benefit or for the benefit of any other person or other entity the following titles or words in connection with his name: "Doctor", "Dentist", "Dr.", "D.D.S.", or "D.M.D.", or any other letters, titles, degrees or descriptive matter which directly or indirectly indicate or imply that he is willing or able to perform any type of dental service for any person or persons, or uses or permits the use of for his benefit or for the benefit of any other person or other entity any card, directory, poster, sign or any other means by which he indicates or implies or represents that he is willing or able to perform any type of dental services or operation for any person;

(11) Directly or indirectly owns, leases, operates, maintains, manages or conducts an office or establishment of any kind in which dental services or dental operations of any kind are performed for any purpose; but this section shall not be construed to prevent owners or lessees of real estate from lawfully leasing premises of those who are qualified to practice dentistry within the meaning of this chapter;

(12) Constructs, supplies, reproduces or repairs any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except when one not a registered and licensed dentist does so pursuant to a written uniform laboratory work order, in the form to be prescribed by the board and copies of which shall be retained by the nondentists for two years, of a dentist registered and currently licensed in Missouri and which said substitute above described is constructed upon or by use of casts or models made from an impression furnished by a dentist registered and currently licensed in Missouri;

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(13) Attempts to or does place any substitute described in subdivision (12) above in a human mouth or attempts to or professes to adjust any substitute or delivers any substitute to any person other than the dentist upon whose order the work in producing the substitute was performed;

(14) Advertises, solicits, or offers to or does sell or deliver any substitute described in subdivision (12) above or offers to or does sell his services in constructing, reproducing, supplying or repairing the substitute to any person other than a registered and licensed dentist in Missouri;

(15) Undertakes to do or perform any physical evaluation of a patient in his office or in a hospital, clinic, or other medical or dental facility prior to or incident to the performance of any dental services, dental operations, or dental surgery. [Emphasis in original.]

Prior to the use of the words "other business enterprise" in Section 332.021.2, RSMo Supp. 1982, Section 332.290.1, RSMo 1959, used the words "dental supply business". Obviously, by substituting the words "other business enterprise" for "dental supply business", the General Assembly intended to expand the scope of the eligibility and qualification requirements for membership on the Missouri Dental Board. It is also obvious that a prepaid dental care benefit plan that contracts with ninety percent of Missouri dentists is an enterprise. The issues are: (1) whether a not-for-profit corporation is a business enterprise, and (2) whether a health services corporation providing prepaid dental services is directly related to the practice of dentistry.

In *Helvering v. Jewel Mining Co.*, 126 F.2d 1011, 1015 (8th Cir. 1942), the court stated: "Inherent in the concept of a business enterprise is the idea of an investment of capital, labor, and management in an undertaking for profit." (Emphasis added.) In *Williams v. Joyce*, 4 Or. App. 482, 479 P.2d 513, 526 (1971), the court stated:

We construe "business enterprise" for the purpose of this statute as it is defined in Black's Law Dictionary (4th ed. 1951):

"Investment of capital, labor and management * * * for profit * * *."

The Honorable John Bass

We construe the use of the words "business" and "business enterprise" as meaning to exclude from the ambit of the Act those persons dealing in or with real property **for reasons other than profit.** [Emphasis added.]

Profit motive is an essential ingredient of a business enterprise. Because Missouri Dental Service, Inc., is a not-for-profit corporation, we believe that it is not a **business enterprise**. We reserve for future determination what constitutes a "direct" relationship between a **business enterprise** and the practice of dentistry.

CONCLUSION

It is the opinion of this office that Missouri Dental Service, Inc., a not-for-profit corporation doing business as a health services corporation, is not a **business enterprise** for purposes of Section 332.021.2, RSMo Supp. 1982.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

JOHN ASHCROFT
ATTORNEY GENERAL

(314) 751-3321

August 17, 1983

OPINION LETTER NO. 201-83

The Honorable Richard P. Beard
Representative, District 113
302 South Osage
Sedalia, Missouri 65301

Dear Representative Beard:

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This letter is in response to your request for an opinion in which you ask whether the Board of Park Commissioners of a third class city is a legally established body with all of the power and authority conferred under Section 90.550, RSMo 1978, even though the board was established by the city council prior to the effective date of Sections 90.500 to 90.570, RSMo 1978, and no successful election has ever been held pursuant to Section 90.500 or its predecessor statutes.

Sections 90.500 to 90.570, RSMo 1978, authorize voters in third class cities to create park boards for the purpose of establishing and maintaining public parks. Sections 90.510 to 90.570 outline, *inter alia*, the powers and duties of park boards. Particularly relevant to your question, however, is Section 90.500.1 which provides:

When one hundred voters of any incorporated city or town having less than thirty thousand inhabitants, or any city of the third class, shall petition the mayor and common council asking that an annual tax be levied for the establishment and maintenance of free public parks in the incorporated city or town, and providing for suitable entertainment therein, and shall specify in their petition a rate of taxation as provided in this section not to exceed forty cents per year on each one hundred dollars of assessed valuation, the mayor and common council shall submit the question to the voters.

The Honorable Richard P. Beard

The tax collected pursuant to the authorization of the voters is to be deposited in a park fund (Section 90.500.3). The exclusive control of the expenditures of the money in the park fund is vested in the park board (Section 90.550).

In your opinion request, you inform us that no successful election has ever been held pursuant to Section 90.500. Therefore, we assume for purposes of this opinion, that any tax collected by the city for parks and recreation purposes is collected pursuant to Section 90.010, RSMo 1978, and 94.070(3), RSMo 1978, and not pursuant to Section 90.500.

Sections 90.500 to 90.570 constitute a comprehensive statutory plan for the establishment of a method to fund and manage public parks in third class cities. Under the facts you have presented to us, the statutory condition precedent, namely, voter authorization for the levy of an annual tax for the establishment and maintenance of free public parks has not occurred. Thus, it is our opinion that the powers granted to a park board pursuant to Section 90.550, are granted only to such park boards as are authorized consistent with the provisions of Section 90.500.

Nor can it be said that the Park Board of Commissioners is a *de facto* park board which, because of its assumption of the powers granted in Section 90.550, properly enjoys the exercise of those powers. In *Cherry v. City Hayti Heights*, 563 S.W.2d 72 (Mo. banc 1978), Supreme Court of Missouri provided the following test for recognition of a *de facto* municipal corporation:

(1) A law under which it might have lawfully have been incorporated; (2) An attempted compliance in good faith with the requirements of the statute as to incorporation; (3) A colorable compliance with the statutory requirements; and (4) An assumption of user of corporate powers. *Id.* at 85.

It is clear that there is a law under which the park board might lawfully have been organized, and the park board has assumed, according to your recitation of facts, the powers of a Section 90.550 park board. A more difficult question is that of colorable compliance with the requirements of the law. Since operation under "color of law" may consist of "simple acquiescence of the public for so long as to raise the presumption of a colorable right," *State ex rel. City of Republic v. Smith*, 139 S.W.2d 929 (Mo. banc 1940), *Fort Osage Drainage Dist. of Jackson County v. Jackson County*, 275 S.W.2d 326 (Mo. 1955), and *State ex rel. Hand v. Bilyeu*, 346 S.W.2d (Mo. App. 1961), the existence of the Park Board of Commissioners in the city in question for over 80 years may provide the requisite "colorable compliance". Nevertheless, in the absence of attempted compliance with statutory require-

The Honorable Richard P. Beard

ments, we do not believe that the Board of Park Commissioners can be considered a *de facto* organization entitled to the exercise of Section 90.550 powers.

In sum, it is the opinion of this office that the Board of Park Commissioners of the city may not exercise the authority conferred by Section 90.550 in the absence of an authorizing election called and held pursuant to the provisions of Section 90.500.

You have not asked, nor do we herein offer an opinion as to whether or not the city, under its municipal powers, could delegate the exclusive control of the parks to a board of park commissioners pursuant to ordinance. We respectfully suggest that as you inform the relevant parties of this opinion, you also inform them of the need to resolve the delegation question prior to a divestiture of the Board of Park Commissioners' authority, since under municipal law, the ordinance may constitute a valid delegation of the city's powers.

Very truly yours,



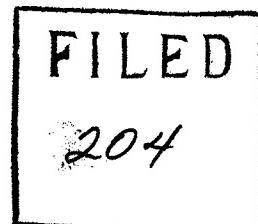
JOHN ASHCROFT
Attorney General

SCHOOLS: The phrase "inclement weather" as found in Section 171.033, RSMo Supp. 1982, includes days on which the weather is oppressively and extraordinarily hot. Under Section 160.041, RSMo 1978, a school district may not adopt an annual calendar designed to operate its schools on an "inclement weather" anticipation schedule by beginning daily sessions one hour later than usual and dismissing one hour earlier than usual, thereby providing for a school day of four hours. Decisions to adjust specific daily school schedules and operations under Section 160.041 must be made as actual weather facts and forecasts become available.

August 30, 1983

OPINION NO. 204-83

Dr. Arthur L. Mallory
Commissioner
Department of Elementary
and Secondary Education
Post Office Box 480
Jefferson City, Missouri 65102



Dear Commissioner Mallory:

This opinion is in response to your request for an opinion on the following questions:

1. Does the term, "inclement weather", as found in Section 160.041 and 171.033, RSMo., 1978, include days when it is uncomfortably hot?
2. Is it permissible under provisions of Section 160.041, RSMo., 1978, for a school district to anticipate "inclement weather" and operate its schools on a "reduced schedule" by beginning daily sessions one hour later than usual and dismissing one hour earlier than usual, thereby providing for a school day of four hours?

Dr. Arthur L. Mallory

In our Opinion No. 149-79, Mallory, 1979, we opined that the General Assembly did not intend to include extraordinarily hot days in its use of the phrase "inclement weather". In reaching that conclusion, we relied primarily on the emergency clause contained in Senate Bill 954, 79th General Assembly, which stated:

Because of the large number of days lost by schools this winter due to the unusually severe winter and because of the necessity for students and teachers in affected schools to begin summer school at times before the school year would end if the district was forced to make up the lost days, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval. Section A, S.B. 954, 79th General Assembly; Mo. Laws 1978, p. 489-90

S.B. 954 was effective April 12, 1978. In addition, we noted in Opinion 149-79, that Webster's New World Dictionary, 2nd Edition, did not include heat in its definition of "inclement".

Opinion 149-79 followed the time-honored canons of construction which require us to seek the intent of the legislature from the language used and to consider the words used in their plain, ordinary meanings. *State v. Kraus*, 530 S.W.2d 684 (Mo. banc 1975); *State ex rel. Dravo Corporation v. Spradling*, 515 S.W.2d 512 (Mo. 1974); *Buechner v. Bond*, 650 S.W.2d 611 (Mo. banc 1983). Our assessment of the intent of the legislature was consistent with the language employed in the emergency clause and with the dictionary definition.

Opinion 149-79 predated the amendment of Section 171.033 by the legislature in 1982, and the canonization of Webster's Third New International Dictionary (1964) by the Missouri Supreme Court. See, *Boone County Court v. State*, 631 S.W.2d 321 (Mo. banc 1982); *Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982); *Buechner v. Bond*, *supra*. For this reason, we reexamine our holding in Opinion No. 149-79, as you have requested.

We note that H.C.S.S.B. 832 (81st General Assembly, Second Regular Session) amended Section 171.033. In this most recent reenactment, the General Assembly made no reference to winter storms as it had in S.B. 954. Therefore, we must examine the ordinary meaning and usage of the term.

Dr. Arthur L. Mallory

We turn now to Webster's Third New International Dictionary, supra, which defines "inclement" as "physically severe or harsh (generally of the elements or weather). . . ." We can think of few things more severe or harsh than the unrelenting heat which oppresses Missouri from time to time. Therefore, we are of the opinion that Section 171.033 includes oppressive heat as it contemplates "inclement weather" and the provisions of that section apply to days on which school is not held due to unusually hot, oppressive weather which destroys the learning environment and which threatens the health and safety of students and school personnel. To the extent Opinion No. 149-79 is inconsistent with our holding herein, Opinion No. 149-79 is withdrawn.

In response to your second question, we note that the provisions of Section 171.033 are not intended to relieve school districts of their obligation to provide education for the students entrusted to their care. In order to qualify for the provisions of the section, the school district must have scheduled "at least two-thirds as many make-up days . . . as were lost in the previous school year. . . ." In addition, the provisions of Section 160.041.1, RSMo 1978, relating to inclement weather and the minimum school day apply. That section states, in pertinent part:

[I]f any school is dismissed because of inclement weather after school has been in session for four or more hours that day shall count as a full day and if school has been in session for two or more hours or more and less than four hours that session shall be counted as one-half day. . . .

As we indicated in Part IV of Opinion No. 149-79, we do not believe that Section 160.041.1 permits advanced scheduling of inclement weather days. The decision as to whether or not it is sufficiently hot to call off all or some portion of a school day must be made on a day-to-day basis and may not be scheduled in advance.

As noted in Opinion No. 149-79:

The entire scheme of statutory minimums for the school term, average daily attendance, and the number of hours in a school day (which is contained in § 160.041, RSMo 1978) is a guarantee to the children of this state and their parents that a minimum number of hours in a classroom under the guidance of trained teachers will be provided. . . .

Dr. Arthur L. Mallory

It is our opinion that advanced scheduling of inclement weather days is not within the intention of the legislature in providing this guarantee.

Options other than an inclement weather declaration are available to school districts in dealing with hot weather. Missouri law does not presently establish the days upon which a school year must begin or end, nor the times at which a school day is to begin or end. In the face of oppressive heat, the school district may opt to re-schedule its starting day until later in the year, when the temperatures have moderated somewhat, or may choose to start classes earlier in the day. However, such rescheduling does not relieve a school district of the statutory minimum requirements for the school term.

CONCLUSION

It is the opinion of this office that the phrase "inclement weather" as found in Section 171.033, RSMo Supp. 1982, includes days on which the weather is oppressively and extraordinarily hot. Under Section 160.041, RSMo 1978, a school district may not adopt an annual calendar designed to operate its schools on an "inclement weather" anticipation schedule by beginning daily sessions one hour later than usual and dismissing one hour earlier than usual, thereby providing for a school day of four hours. Decisions to adjust specific daily school schedules and operations under Section 160.041 must be made as actual weather facts and forecasts become available.

Very truly yours,



JOHN ASHCROFT
Attorney General

CITY COURTS:
CITY, TOWNS AND VILLAGES:
CITY CONTRACTS:
VILLAGES:
CITY JUDGE:
COURT RULES:
COURTHOUSE:
COOPERATIVE AGREEMENTS:

A village organized pursuant to Chapter 80, RSMo 1978 and Supp. 1982, may hold hearings on municipal ordinance violations outside the corporate boundaries of the village and inside the corporate boundaries of a neighboring municipality, if

(1) the village and municipality enter into a cooperative agreement regarding the operation of the courtroom to be used pursuant to Section 70.220, RSMo 1978,

(2) the village expresses its consent to the promulgation of a local court rule by the relevant circuit court authorizing the filing and assignment of municipal division cases outside the boundaries of the village pursuant to Section 478.245, RSMo 1978, and

(3) the circuit court promulgates such a rule.

September 23, 1983

OPINION NO. 205-83

The Honorable Harriett Woods
Senator, District 13
6665 Delmar
St. Louis, Missouri 63130

Dear Senator Woods:

This opinion is in response to your question asking:

Can a Village incorporated pursuant to Chapter 80, R.S. Mo., by a cooperative agreement, use a Courtroom outside its corporate boundaries, in an adjoining City, in which to hold hearings on Municipal Ordinance Violations before the Municipal Judge of the Village?

In Opinion No. 32, Garnholz, 1956, this office concluded that a municipal court held pursuant to Section 80.260, RSMo 1949 (repealed), could be held anywhere within the corporate limits of the town or village, as the chairman of the board of trustees of the town or village selected.

In concluding that towns and villages could not hold municipal court outside their boundaries, we were merely applying the general rule that municipalities do not have extraterritorial powers. See, e.g., Taylor v. Dimmitt, 336 Mo. 330, 337, 78 S.W.2d

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The Honorable Harriett Woods

841, 843 (1934) ("Usually, a municipality's jurisdiction ceases at its boundaries;"); Missouri Public Service Co. v. City of Trenton, 509 S.W.2d 770, 775 (Mo. App. 1974) ("[M]unicipally owned electric utilities have only such extraterritorial powers as the General Assembly deems fit to give them,").^{1/}

Section 479.060.1, RSMo 1978, states:

Where municipal violations are to be tried before a municipal judge or judges, the governing body of the municipality shall provide by ordinance for a clerk or clerks and such other nonjudicial personnel as may be required for the proper functioning of the municipal division or divisions and shall provide a suitable courtroom in which to hold court. The salaries of the judges, clerks and other nonjudicial personnel and other expenses incidental to the operation of the municipal divisions shall be paid by the municipality.
[Emphasis added.]

This statute does not grant the governing body of a municipality the express authority to operate a municipal court outside the boundaries of the municipality. This office has found no authority stating that municipalities may have the implied authority to do so. This apparent lack of authority on the part of municipalities, however, does not settle the matter.

The adoption of C.C.S.S.J.R. 24, 1975-1976 Mo. Laws 803 (adopted August 3, 1976, effective January 2, 1979), sometimes known as the "Judicial Article Amendment", by the People and the enactment of the Court Reform and Revision Act of 1978, H.B. 1634, 1978 Mo. Laws 696, have resulted in the abolition of municipal corporation courts.

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Missouri courts have recognized extraterritorial municipal powers when the health or safety of city inhabitants is at stake. In Miller v. City of St. Joseph, 485 S.W.2d 688 (Mo. App. 1972), a firefighter objected to the city's "agreement" to fight fires in stockyards and other places outside the city limits on the ground that the firefighter would lose his sovereign immunity in fighting such fires and would be subject to claims created by his actions in fighting such fires. The court found this extraterritorial firefighting to be authorized under a provision of the city charter authorizing the city to do all things whatsoever necessary or expedient for promoting and maintaining the safety, health, welfare, trade, commerce or industry of the city and its inhabitants.

The Honorable Harriett Woods

Article V, Section 27.2, Missouri Constitution, states in part:

All . . . municipal corporation courts shall continue to exist until the effective date of this article at which time said courts shall cease to exist. When such courts cease to exist:

. . . .

d. The jurisdiction of municipal courts shall be transferred to the circuit court of the circuit in which such municipality or major geographical area thereof shall be located and, such courts shall become divisions of the circuit court. When such courts cease to exist, all records, papers and files shall be transferred to the circuit court which may designate the place where such records may be maintained.

Section 479.010, RSMo 1978, states: "Violations of municipal ordinances shall be tried only before divisions of the circuit court as hereinafter provided by this chapter."

Judges of municipal divisions are subject to such circuit court rules as are consistent with the rules of the Supreme Court of Missouri, and such judges are subject to the general administrative authority of the presiding judge of the circuit court. Section 479.020.5, RSMo 1978.

The authority of the circuit court to adopt local rules is specified in Section 478.245, RSMo 1978, which states in part:

1. Subject to the provisions of article V of the constitution and authority exercised under such provisions, the circuit judges of the circuit may adopt local court rules which provide:

. . . ;

(2) Filing (including the place of filing) and assignment systems for the circuit court of each county which may include (a) centralized filing procedures for cases which are heard by circuit judges, (b) centralized assignment procedures or individualized docketing procedures for cases or classes of

The Honorable Harriett Woods

cases which are heard by circuit judges, and
(c) filing and assignment procedures for cases
which are heard by municipal judges.

2. Notwithstanding the provisions of subsection 1 of this section, no such local circuit court rule:

. . . ;

(3) Shall provide for the filing of cases or the maintenance of the permanent records in cases which are heard by municipal judges outside of the municipality providing the municipal judge, except in those situations where there is a trial de novo or the municipality consents to such filing or maintenance of records. [Emphasis added.]

Section 478.245.1(2) and .2(3), RSMo 1978, indicate that a circuit court may adopt a local court rule providing for the place of filing and assignment of municipal division cases outside the municipality, if the municipality consents to such filing or maintenance of records. (An examination of page 18 of the local court rules for the Twenty-First Judicial Circuit (St. Louis County) shows that this circuit presently has no local rule 9.1 or 9.21 on the assignment of courtrooms or place of hearing.)

Section 70.220, RSMo 1978, *inter alia*, authorizes villages to contract with other municipalities and political subdivisions for the operation of any public facility; provided, the subject and purposes of any such cooperative agreement made and entered into by the village and municipality or political subdivision is within the scope of the powers of such village and municipality or political subdivision. Cf. Section 71.300, RSMo 1978 (providing for county and municipal court contracts). Obviously, providing a municipal courtroom is within the scope of the powers of municipalities. Section 479.060.1, RSMo 1978. Also, a courtroom is a public facility. Therefore, a village and a city may contract regarding cost-sharing and other arrangements for a municipal courtroom pursuant to Section 70.220, RSMo 1978, and such agreement may act as the "consent" necessary to empower a circuit court to promulgate a rule authorizing "extraterritorial" filing of municipal division cases for that municipality.

CONCLUSION

It is the opinion of this office that a village organized pursuant to Chapter 80, RSMo 1978 and Supp. 1982, may hold hearings on municipal ordinance violations outside the corporate boundaries of the village and inside the corporate boundaries of a

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neighboring municipality, if (1) the village and municipality enter into a cooperative agreement regarding the operation of the courtroom to be used pursuant to Section 70.220, RSMo 1978, (2) the village expresses its consent to the promulgation of a local court rule by the relevant circuit court authorizing the filing and assignment of municipal division cases outside the boundaries of the village pursuant to Section 478.245, RSMo 1978, and (3) the circuit court promulgates such a rule.

Very truly yours,



JOHN ASHCROFT
Attorney General

ANNUAL LEAVE:

COMPENSATION:

STATE OFFICERS:

payment of accrued annual leave upon termination as department director.

Officials whose salary and compensation is specified in Section 105. 950, RSMo Supp. 1982, are not entitled to

October 21, 1983

OPINION NO. 209-83

The Honorable James F. Antonio, CPA
State Auditor
State Capitol Building
Jefferson City, Missouri 65101



Dear Dr. Antonio:

This opinion is in response to your questions asking:

1. Was a member of the State Tax Commission who left the commission in February, 1978 entitled to the payment of accrued annual leave upon leaving the commission?
2. Was a member of the State Tax Commission who left the commission in March, 1979 entitled to the payment of accrued annual leave upon leaving the commission?
3. Was a member of the State Board of Probation and Parole who left the board in April, 1980 entitled to the payment of accrued annual leave upon leaving the board?
4. Is a department director whose salary is specified in Section 105.950, RSMo Supp. 1981 entitled to the payment of accrued annual leave upon his termination as department director?

The Honorable James F. Antonio, CPA

Because the first three questions presented deal with the legality of past payments of money to public officials, this office does not believe that the opinion process is the appropriate forum to address these issues.

Section 27.060, RSMo 1978, states in part:

The attorney general shall institute, in the name and on the behalf of the state, all civil suits and other proceedings at law or in equity requisite or necessary to protect the rights and interests of the state, and enforce any and all rights, interests or claims against any and all persons, firms or corporations in whatever court or jurisdiction such action may be necessary; . . .

This office shall investigate the factual background behind the first three questions asked and determine if a collection action is in the best interest of the state.

The fourth question does not involve a specific factual background, and we believe this question may be properly addressed through the opinion process.

Section 36.350, RSMo Supp. 1982, relating to sick and annual leave states:

The regulations shall provide for the hours of work, holidays, attendance, and leaves of absence in the various classes of positions subject to this law. They shall contain provisions for annual leave, sick leave, and special leaves of absence, with or without pay, or with reduced pay, and may allow special extended leaves for employees disabled through injury or illness arising out of their employment, and the accumulation of annual leave and sick leave. Such regulations shall apply in all state agencies. [Emphasis added.]

The above-emphasized language was first introduced into the law by C.C.S.H.B. 673, 1979 Mo. Laws 213, 225-226. In Opinion No. 46, Bradford, 1980, this office concluded that the above-emphasized language makes regulations promulgated by the Personnel Advisory Board pursuant to Section 36.350, RSMo Supp. 1979, applicable to all state agencies, except the University of Missouri.

The Honorable James F. Antonio, CPA

1 CSR 20-5.020(1)(A) and (E) state:

(1) Annual leave or vacation in the classified service shall be governed by the following provisions:

(A) Each provisional, probationary, or regular employee shall be entitled to annual leave or vacation with full pay computed at the rate of one and one-fourth (1 1/4) working days for each calendar month of service during at least fifteen (15) working days of which month such employee has been in pay status.

• • •

(E) An employee entitled to annual leave who has resigned in good standing or whose services have been otherwise terminated, shall be entitled to receive reimbursement for all such accrued leave computed and paid on the same basis as regular employees remaining in the service, except in cases of proven theft, destruction or willful abuse of state property. [Emphasis added.]

The right of public officers to compensation is purely a creature of statute, and such compensation statutes are strictly construed against the public officer. See, e.g., Becker v. St. Francois County, 421 S.W.2d 779, 782 (Mo. 1967); Felker v. Carpenter, 340 S.W.2d 696, 701 (Mo. 1960); Nodaway County v. Kidder, 344 Mo. 795, 801, 129 S.W.2d 857, 860 (1939); State ex rel. Igoe v. Bradford, 611 S.W.2d 343, 350 (Mo. App. 1980).

Section 105.950, RSMo Supp. 1981 (now, RSMo Supp. 1982), states:

The commissioner of administration, the director of the department of agriculture, the director of the department of consumer affairs, regulation and licensing, the director of the department of labor and industrial relations, the director of the department of natural resources, the director of the department of public safety, the director of the department of revenue, and the director of the department of social

The Honorable James F. Antonio, CPA

services shall receive an annual salary of forty thousand dollars payable out of the state treasury.

Strictly construed, as Missouri appellate decisions require, this statute creates a right of compensation of a certain amount of money. The statute mentions nothing of annual leave benefits. If the heads of departments were entitled to compensation for annual leave benefits, their compensation would, in our opinion, exceed the statutory rate specified by the General Assembly.

CONCLUSION

It is the opinion of this office that officials whose salary and compensation is specified in Section 105.950, RSMo Supp. 1982, are not entitled to payment of accrued annual leave upon termination as department director.

Very truly yours,



JOHN ASHCROFT
Attorney General

DEPARTMENT OF CORRECTIONS
JAIL COMMITMENT
JAILS
PRISON
EMERGENCIES

The Director of the Department of Corrections and Human Resources cannot as a part of his declaration of an "emergency" under Section 217.210, RSMo Supp. 1982, refuse to accept new commitments from the Circuit Courts of this State to the Division of Adult Institutions although the maximum capacity as set by the Director for population has been reached at each institution within the Division.

November 17, 1983

OPINION NO. 210-83

The Honorable Robert Fowler
Representative, District 80
Capitol Building, Room 401B
Jefferson City, Missouri 65101

Dear Representative Fowler:



This is in response to your request for an opinion as follows:

Does the Director of the Department of Corrections and Human Resources have the power to refuse to accept new inmates ordered committed to the Division of Adult Institutions by the Circuit Courts of the State of Missouri? Specifically, assuming the maximum capacity has been reached at each institution, may the Director of the Department as a part of his declaration of an "emergency" refuse to accept new commitments from the Circuit Courts of this State?

Section 217.155.1, RSMo Supp. 1982, provides, inter alia:

"The division [of adult institutions] shall manage, supervise, and direct all adult correctional, rehabilitative, and training activities, shall provide for the protection, care, discipline, instruction and suitable quartering of all persons legally assigned to its jurisdiction and shall operate programs and activities designed to release

Honorable Robert Fowler

such persons as useful, productive and law-abiding citizens."

Subsection 2 of Section 217.155 provides that the Division of Adult Institutions shall, in addition to any other duties imposed by Chapter 217, have control and jurisdiction over all persons who are legally sentenced and committed to the custody of the Division.

Section 217.210, RSMo Supp. 1982, provides:

"1. The maximum capacity of correctional facilities shall be determined by the director of the department with the concurrence of the division director.

2. When any correctional facility is at the maximum capacity, an inmate may be assigned to that institution only when an emergency is declared by the director of the department."

Sections 217.155 and 217.210 were enacted at the same time as part of House Bill No. 1196 by the 82nd General Assembly (1982).

Section 217.155, RSMo Supp. 1982, provides that the Division of Adult Institutions shall provide suitable quartering of all persons legally assigned to its jurisdiction and shall have control and jurisdiction over all persons who are legally sentenced and committed to the custody of the Division. Generally, the use of the word "shall" in a statute is mandatory and not permissive. Sho-Me Power Corporation vs. City of Mountain Grove, 467 S.W. 2d 109, 112 (Mo.App. 1971). In the interpretation of statutes, the determination of whether a statute is mandatory or directory ordinarily arises in determining whether failure to comply with a statutory provision makes an act or proceeding void. However, when a statute creates an official duty in the interest of the public, and when the General Assembly imposes such duty upon a public officer, he has no discretion as to whether or not it should be performed. State ex rel. McTague vs. McClellan, 532 S.W.2d 870, 871 (Mo.App., St.L.D. 1976).

Based on these principles of statutory interpretation, the duty imposed by Section 217.155 on the Division of Adult Institutions to provide suitable quartering for those persons sentenced to the custody of the Division is mandatory. The Division must accept control and jurisdiction of persons sentenced to it.

The Honorable Robert Fowler

Section 217.210, RSMo Supp. 1982, specifically provides that if an "emergency" is declared, an inmate may be assigned to an institution although its designated maximum capacity has been reached. The term "emergency" is not defined in this section or Chapter 217 generally. In determining the meaning of a statute, the primary object of statutory interpretation is to ascertain the intent of the legislature from the language used, and to give effect to that intent. In doing so, words used in a statute are considered in their plain and ordinary meaning. Springfield Park Central Hospital vs. Director of Revenue, 643 S.W.2d 599, 600 (Mo. 1983). The particular meaning to be ascribed to specific words and phrases in statutes must depend to some extent upon the context in which they are used. City of Willow Springs vs. Missouri State Librarian, 596 S.W.2d 441, 445 (Mo. banc 1980). Where a statute limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. State ex rel. State Highway Commission vs. County of Camden, 394 S.W.2d 71 (Spr.Ct.App. 1965). Under the rule that the express mention of one thing implies the exclusion of another, where special powers are expressly conferred or special methods are expressly prescribed for the exercise of the power, other powers and procedures are excluded. Brown vs. Morris, 365 Mo. 946, 955, 290 S.W.2d 160, 166 (banc 1956). Further, an entire act must be construed together and all provisions must be harmonized, if reasonably possible, and every word, clause, sentence, and section given some meaning. Eminence R1 School District vs. Hodge, 635 S.W.2d 10, 13 (Mo. 1982).

Pursuant to these rules of statutory interpretation, the director's capacity to declare an "emergency" occurs only in the situation specifically enumerated in Section 217.210, that is, when a need arises to place inmates in an institution which is at capacity. This statute does not grant to the director an ability to declare an "emergency" for purposes of refusing to accept inmates assigned to the jurisdiction and control of the Division of Adult Institutions, regardless of how many institutions may be at their maximum population level.

CONCLUSION

It is the opinion of this office that the Director of the Department of Corrections and Human Resources cannot as a part of his declaration of an "emergency" under Section 217.210, RSMo Supp. 1982, refuse to accept new commitments from the

The Honorable Robert Fowler

Circuit Courts of this State to the Division of Adult Institutions although the maximum capacity as set by the Director for population has been reached at each institution within the Division.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Kristie Green.

Very truly yours,


JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

October 3, 1983

OPINION LETTER NO. 219-83

Jane Bierdeman-Fike, Chairperson
Board of Trustees
Missouri State Employees' Retirement System
Post Office Box 209
Jefferson City, Missouri 65102

FILED

219

Dear Mrs. Bierdeman-Fike:

This is in response to the request of the Board of Trustees of the Missouri State Employees' Retirement System for an opinion on the following:

May the Missouri General Assembly legally make a grant of funds to the Missouri State Employees' Retirement System for the operation and support of the Missouri State Medical Care Plan, specifically to the incurred and unreported reserve fund, which grant would be used by the Medical Care Plan to pay medical claims for employees and their dependents and retirees and their dependents, only if necessary?

The Missouri State Medical Care Plan is a program to provide insurance benefits to cover hospital, surgical, and medical expenses for state employees, their spouses, and unemancipated children who have not attained 23 years of age, retired employees and their dependents, and the surviving dependents of deceased state employees. The plan was established in 1972 and is administered by the Board of Trustees of the Missouri State Employees' Retirement System pursuant to Section 104.515, RSMo Supp. 1982. The Missouri State Employees' Retirement System is a body corporate and an instrumentality of the state under Section 104.320, RSMo Supp. 1982, originally enacted in 1957. Pursuant to Section 104.515.4, the retirement system has established and is maintaining a separate account for hospital, surgical, medical, and life insurance benefits payable under the Missouri State Medical Care Plan. All medical benefits are paid solely from this separate account and all premiums are paid into the separate account, which is not commingled with any other funds, property, or investment return of the retirement system.

Jane Bierdeman-Fike
October 3, 1983
Page Two

Since all medical claims, including those for employees, their dependents, and retirees and their dependents, are paid out of this fund, the fluctuations and upward variances in claims submitted to the Medical Care Plan in any single month have raised the short-term prospect of depletion of an adequate working reserve. For this reason, it has been suggested that the Missouri General Assembly appropriate a grant of funds to the Missouri State Employees' Retirement System to carry the Medical Care Plan through a shortfall in the medical benefits fund, which has been projected as a possible occurrence in the near future. The grant would be used for support purposes only, and the funds made available thereby would be used only if necessary to pay medical claims in excess of the reserves heretofore established.

Except for the restrictions imposed by the state Constitution, the power of the state legislature is unlimited and practically absolute. The Missouri Constitution, unlike the United States Constitution, is not a grant of power, but rather, regarding legislative power, only a limitation. Menorah Medical Center v. Health and Educational Facilities Authority, 584 S.W.2d 73, 77 (Mo. banc 1979); State ex rel. Jardon v. Industrial Development Authority of Jasper County, 570 S.W.2d 666, 673 (Mo. banc 1979); Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951). In our opinion, the power of the legislature in this matter is limited only by Article III, Section 38(a), of the Missouri Constitution (1945), which prohibits the General Assembly from granting public money or property, or lending or authorizing the lending of public credit to any private person, association, or corporation.

As an instrumentality of the state, the retirement system does not constitute a private person, association, or corporation from which the General Assembly would be prohibited from granting funds under Article III, Section 38(a), of the Missouri Constitution. A grant by the legislature to the retirement system for the purpose of buttressing the medical reserves available to pay medical claims of state employees could not be construed as a grant for private purposes. Benefits in addition to wages can certainly be made available to state employees.

However, it is arguable that a grant of funds by the legislature to the retirement system for the Missouri State Medical Care Plan could be considered a grant to private persons because some of the benefits may inure to the dependents of employees and retirees and their dependents, who are private persons. As stated earlier, the proposed grant is for the purpose of buttressing the account maintained for hospital, surgical, medical, and life insurance benefits in the event said benefits exceed the amount of premiums previously received by the Medical Care Plan. In the event the surplus has been exhausted, the grant would be

Jane Bierdeman-Fike
October 3, 1983
Page Three

used to meet medical claims incurred by spouses and children of employees. In State ex rel. Sanders v. Cervantes, 480 S.W.2d 888 (Mo. banc 1972), the Missouri Supreme Court held that a plan for a city to expend public funds directly for insurance coverage for spouses and children of police officers and employees was unconstitutional because of Article VI, Section 25, a section similar to Article III, Section 38(a), that prohibits counties, cities, and other political corporations and subdivisions from granting public money to any private individual.

In our opinion, the Cervantes case is distinguishable from the facts outlined in your opinion request. First of all, the court declared unconstitutional only those acts by which direct payments were made to provide insurance coverage for private individuals, not employees. In this instance, the grant of funds would benefit the operation and cash flow of the Medical Care Plan itself, a plan operated by the Missouri State Employees' Retirement System for the benefit of all members, including active employees, as well as dependents, retirees, and their dependents. As such, it would not be an expenditure of public funds directly for the medical coverage of private persons only.

Second, and more importantly, the Missouri Supreme Court has also recognized that Article III, Section 38(a), does not prohibit the granting of public money in any event if the grant is for a public purpose. Americans United v. Rogers, 538 S.W.2d 719 (Mo. banc 1976); State ex rel. Wagner v. St. Louis County Port Authority, 604 S.W.2d 592, 602 (Mo. banc 1980); Menorah Medical Center v. Health and Educational Facilities Authority, supra, at 78-79. Although a grant of funds by the legislature for the Medical Care Plan might result in benefits filtering through to dependents of state employees and other private persons, a public purpose would certainly be served by not allowing the reserve fund of the Medical Care Plan to be depleted, possibly resulting in the demise of the program to provide health benefits to state employees. Such an occurrence could result in providers of medical care and services not being paid for those services, or medical providers not honoring state employees' membership in the Medical Care Plan, or possibly refusing medical treatment to state employees. In such an event, the state would find it exceedingly difficult to attract and maintain competent public servants in its employment, and would likely experience a drastic shrinkage in the number of individuals willing to accept state employment.

In several instances, it has been held that constitutional prohibitions are not violated simply because incidental benefits may accrue to private interests. State ex rel. Jardon v. Industrial Development Authority of Jasper County, supra, at 674;

Jane Bierdeman-Fike
October 3, 1983
Page Four

State ex rel. Farmers' Electric Cooperative, Inc. v. State Environmental Improvement Authority, 518 S.W.2d 68, 74-75 (Mo. banc 1975); State v. Land Clearance for Redevelopment Authority of Kansas City, Missouri, 270 S.W.2d 44, 53 (Mo. banc 1954); Americans United v. Rogers, 538 S.W.2d 711, 719 (Mo. banc 1976); and Annbar Associates v. West Side Redevelopment Corporation, 397 S.W.2d 635, 653 (Mo. banc 1965). Under the facts presented, it is conceivable that a grant of funds by the legislature to the Medical Care Plan might result in benefits filtering through to dependents of state employees and other private persons. However, such a result is certainly incidental to the overriding public purpose of maintaining the fund from which all medical claims of state employees as well as their dependents, and retirees and their dependents, are paid.

It is the opinion of this office that the Missouri General Assembly may legally make a grant of funds to the Missouri State Employees' Retirement System for the operation and support of the Missouri State Medical Care Plan, which grant would be used by the Medical Care Plan to pay medical claims for employees and their dependents and retirees and their dependents if necessary.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

November 14, 1983

OPINION LETTER NO. 222-83

The Honorable Merrill Townley
Representative, District 111
State Capitol Building, Room 101C
Jefferson City, Missouri 65101

222

Dear Representative Townley:

This letter is rendered in response to your request for an opinion asking:

Whether the City of Linn may place the city vehicle license fee on annual real and personal property tax statements.

We understand that the City of Linn is a fourth class city. Section 301.340, RSMo 1978, authorizes municipalities, by ordinance, to levy and collect certain motor vehicle license taxes. Section 94.290, RSMo 1978, requires the city clerk of fourth class cities to make out appropriate property tax books and charges the city collector with the full amount of property taxes to be collected. This statute also charges the city collector "with all licenses and other duties of all kinds to be collected." The tax statement to be employed by the collector to collect taxes and licenses is not specified by statute; however, we believe that a reasonable method of collecting city property taxes and motor vehicle license taxes is to combine them on the same statement, so long as the taxes are separately stated and identified.

Very truly yours,



JOHN ASHCROFT
Attorney General

NEWSPAPERS:

A newspaper published as a weekly

LEGAL PUBLICATIONS:

paper which converts to a daily
paper may use the time published as

a weekly paper together with the time published as a daily paper
to satisfy the provision of Section 493.050, RSMo 1978, requiring
a newspaper to have been published regularly and consecutively for
a period of three years.

December 29, 1983

OPINION NO. 227-83

The Honorable Lester R. Patterson
Representative, District 48
803 Cedar
Lee's Summit, Missouri 64063

227

Dear Representative Patterson:

This is in response to your request for an opinion as follows:

May a "weekly" paper that has operated as such for many years which converts to a "daily" paper qualify for the three years of regular and consecutive publication required by section 493.050, RSMo 1978, without having to wait three years after having published daily?

Section 493.050, RSMo 1978, describes the type of newspapers in which legal advertisements and notices may be published. That section reads, in pertinent part:

All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, triweekly, semiweekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication; shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time;
. . . .

The Honorable Lester R. Patterson

We find no provision in either Missouri statutes or appellate judicial decisions specifically addressing the qualifications of a newspaper for legal publications in situations where a newspaper changes from a weekly to a daily publication. Therefore, we must turn to Section 493.050 and construe its language so as to give effect to the legislature's intent in enacting the statute. In so doing, we must consider the purpose and object of the statute. See, Press-Journal Publishing Company v. St. Peters Courier-Post, 607 S.W.2d 453, 456, (Mo. App. 1980); State ex rel. Henderson v. Proctor, 361 S.W.2d 802, 804 (Mo. banc 1962).

The Missouri Supreme Court interpreted the three-year requirement of Section 493.050 in Proctor, stating, in relevant part:

Prior to 1937 the law of Missouri . . . provided that such newspapers be published regularly and consecutively for a period of only one year. In 1937 the period was changed to require a period of three years. We think it may be reasonably deduced that the primary and basic purpose of the act is to require publication in a "going", regularly published and well established newspaper. This, upon the theory that, by reason of long establishment of the newspaper in which it is published, the notice will be more likely to come to the attention of a greater number of citizens of the county. Proctor, supra at 805.

We believe that a newspaper published for many years as a weekly paper which converts to a daily paper does not lose its status as a going, regularly published, and well-established newspaper merely as a result of such conversion. To require such a newspaper to begin a new three-year period of publication after converting to a daily paper is an overly strict interpretation of Section 493.050, placing too much emphasis on form rather than on the substance and purpose of the three-year requirement. See, St. Peters Courier-Post, supra at 459.

Our opinion is in accord with the decision of the California Court of Appeals in In re Tribune Pub. Co. of Palo Alto, 108 P. 667 (Cal. App. 1910), where a California statute required, among other things, that a newspaper shall have been established, printed, and published at regular intervals for at least one year in order to be entitled to print public and legal notices. In that case the Palo Alto Tribune was published as a weekly paper

The Honorable Lester R. Patterson

during part of the required one-year period, and as a daily paper during the remainder of that one-year period. The California Court of Appeals ruled:

[I]t appears plain to us, bearing in mind the purpose of the act as well as the language of the provision in question, that the publication in this case constitutes a publication at regular intervals for one year. Id. at 668.

See also, St. Peters Courier-Post, supra at 459 (ruling that a newspaper which underwent a change of name and ownership did not lose its status as a well-established and going newspaper by reason of such change).

Furthermore, it is possible to ascertain the intent of the legislature in enacting Section 493.050 by examining the language of related statutes. St. Peters Courier-Post, supra at 456. Section 493.070, RSMo 1978, requires that in cities of a population of 100,000 inhabitants or more, all public notices and advertisements shall be published in some daily newspaper of such city, as opposed to a triweekly, semiweekly, or weekly newspaper. The statute further requires, among other things, that such daily newspaper "shall have been established and continually published as such for a period of at least three consecutive years next prior to the publication of any such notice". Section 493.070, RSMo 1978 (emphasis added). By using the term "as such", the Missouri General Assembly intended to preclude from consideration in cities of a population of 100,000 inhabitants or more those newspapers which were not operating as daily papers for the entire three-year period.

The three-year requirement of Section 493.050 does not contain the phrase "as such" or any similar language. "If the legislature had intended that the same requirements set forth in . . . [Section 493.070] were to be the requirements of § 493.050, it would have used the same or similar wording." St. Peters Courier-Post, supra at 456.

CONCLUSION

It is the opinion of this office that a newspaper published as a weekly paper which converts to a daily paper may use the time published as a weekly paper together with the time published as a daily paper to satisfy the provision of Section 493.050, RSMo 1978, requiring a newspaper to have been published regularly and consecutively for a period of three years. This opinion does not address whether such a newspaper meets the other requirements of Section 493.050, RSMo 1978.

The Honorable Lester R. Patterson

The foregoing opinion which I hereby approve, was prepared by my assistant, Robert E. Dolan, Jr.

Very truly yours,

John Ashcroft

JOHN ASHCROFT
Attorney General

Attorney General of Missouri

POST OFFICE BOX 899

JEFFERSON CITY, MISSOURI 65102

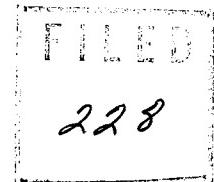
(314) 751-3321

JOHN ASHCROFT
ATTORNEY GENERAL

October 18, 1983

OPINION LETTER NO. 228-83

The Honorable James C. Kirkpatrick
Secretary of State
Room 209, State Capitol Building
Jefferson City, Missouri 65101



Dear Mr. Kirkpatrick:

This letter is in response to your request for an opinion as follows:

Is it mandatory that a petition for an independent candidate for the Office of State Representative be filed with the Office of the Secretary of State. If so, must the petition language on each petition page state clearly that the petition is being filed with the Office of Secretary of State?

If the answer is yes to the above, would an improper procedure invalidate the petition?

In addition, you provided the following factual information:

On Tuesday October 11, 1983, at 1:47 PM Mr. Algin Robinson presented a petition to this office purporting to be his nominating petition as a candidate for the Office of State Representative of the 59th Legislative District, to be voted on at a special election Tuesday November 8, 1983. The petition contained 26 pages identical in form as to the printed matter on which the petition was directed to "The Honorable Board of Election Commissioners for the City of St. Louis".

The Honorable James C. Kirkpatrick

Section 115.321.1, RSMo 1978, provides in pertinent part:

Any person desiring to be an independent candidate for any office to be filled by voters throughout the state, or for any congressional district, state senate district, state representative district . . . , shall file a petition with the secretary of state.
[Emphasis added]

Section 115.325.3, RSMo 1978, provides in pertinent part:

Each sheet of each petition for nomination of an independent candidate for public office shall be in substantially the following form:

* * *

PETITION FOR THE NOMINATION OF AN
INDEPENDENT CANDIDATE

To the Honorable(title of official with whom petition is to be filed) for (the state of Missouri or appropriate county): [Emphasis added.]

Pursuant to Section 115.321.1, the Secretary of State is the proper official with whom an independent state representative candidate must file a Petition for Nomination as an Independent Candidate.

We assume from your statement of facts that the Petition for the Nomination of an Independent Candidate was filed with your office, consistent with the requirements of Section 115.321.1. We further assume that the only deviation from the form provided in Section 115.325.3 is the designation of "The Honorable Board of Election Commissioners for the City of St. Louis" as the officials with whom the petition would be filed. Our opinion, then, must necessarily turn on whether the petition as filed deviates "substantially" from the form adopted by the legislature in Section 115.325.3.

Our Supreme Court has construed the word "substantially", in reference to a taxation statute as being "synonymous with 'practically' 'nearly', 'almost', 'essentially' and 'virtually'." *St. Louis-South Western Railway Co. v. Cooper*, 496 S.W.2d 836, 842 (Mo. 1973). The phrase "substantially the following form" has been held not to require the exact form prescribed, but to require

The Honorable James C. Kirkpatrick

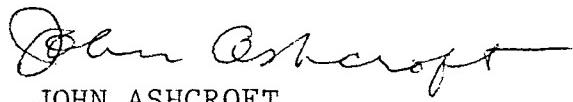
only that in the main, all the essential requirements of the form be met. *People ex rel. Darr v. Alton R. Co.*, 43 N.E.2d 964, 966 (Ill. 1942).

Furthermore, in several cases involving the form of election ballots, the Supreme Court of Missouri has stated that where statutes provide that ballots be in a certain form without prescribing what results would follow if they were not used as required, the statutes are directory rather than mandatory. The test is "whether or not the voters were afforded an opportunity to express and that they did fairly express their will." *State ex rel. City of Memphis v. Hackman*, 202 S.W. 7, 14 (Mo. banc 1918); *Ginger v. Halferty*, 193 S.W.2d 503, 505 (Mo. 1946); *City of Raytown v. Kemp*, 349 S.W.2d 363, 369 (Mo. banc 1961).

We are convinced that it is the information required in the second full paragraph of the Section 115.325.3 form which is essential to a Petition for the Nomination of an Independent Candidate. Without this information the petition cannot be effective. The first full paragraph of the suggested form is merely a salutation; it is, in our opinion, precatory and directory since such a petition must be filed in the office of the proper official to be effective. Section 115.321.1.

Thus, it is our opinion that Section 115.321.1 requires an independent candidate for the office of state representative to file a Petition for the Nomination of an Independent Candidate with the Secretary of State of Missouri. It is further our opinion that the petition should substantially comply with the provisions of Section 115.325.3. Finally, we believe that the petition's failure to designate the official with whom the petition will be filed correctly will not invalidate such petition.

Very truly yours,


JOHN ASHCROFT
Attorney General

ABANDONED ROADS AND HIGHWAYS:
COUNTY ROADS:
PUBLIC ROADS:
VACATING PUBLIC ROADS:

road which has not been found to be abandoned. A county must maintain a public road to the level of funds available for that purpose.

The county court of a third-class county must comply with Section 228.110, RSMo 1978, to vacate a county public

December 29, 1983

OPINION NO. 229-83

Jo Beth Prewitt
Prosecuting Attorney of Oregon County
Post Office Box 393
Alton, Missouri 65606

229

Dear Ms. Prewitt:

This is in response to your request for an opinion on the following questions:

Does the county court of a Missouri county of the third class have the authority to close public roads within the county without following the statutory procedures set forth in Chapter 228, RSMo?

Does it have the authority to enter into an agreement not to maintain a public road?

In addition, you inform us:

The county court of Oregon County has agreed with the United States Department of Agriculture, Forest Service, to close a portion of the "Bliss Springs" road in Oregon County. . . . Residents in the area where the road is located are questioning the authority of the county court to close the road.

Jo Beth Prewitt

There are two issues involved. One is whether the road is in deed a public road, which should be decided by the courts. The other issue, on which an opinion is sought, is whether, assuming that a road is public, the county court has the authority to agree to close it to public use without following the procedures outlined in Chapter 228, RSMo. governing vacation of roads. If not, does the court have authority to agree not to maintain a public road?

We assume, for purposes of this opinion, that Bliss Springs Road is a public road.

Vacation or abandonment of a public road can only be accomplished in accordance with statutory procedures. See Sections 228.110 and 228.190, RSMo 1978, and County of Bollinger v. Ladd, 564 S.W.2d 267, 270 (Mo. App. 1978). Section 228.190, RSMo 1978, provides that "nonuse by the public for five years continuously of any public road shall be deemed an abandonment and vacation of the same." In order for a public road to be vacated by abandonment, a "clear and entire abandonment by the public" must exist during this five-year period. Seaton v. Weir, 633 S.W.2d 212, 213 (Mo. App. 1982). If the road is infrequently or rarely used or is only partially used by the public, it is not abandoned. Hedges v. County Court of Ray County, 581 S.W.2d 63 (Mo. App. 1979). From the fact situation you present, we do not believe Bliss Springs Road has been abandoned.

Once a road has been established as a public road, the right to use the road vests in the public. Gerst v. Flinn, 615 S.W.2d 628, 631 (Mo. App. 1981). Assuming, as we do, that the road herein is not abandoned, the only lawful means to vacate the county public road is the method provided by Section 228.110, RSMo 1978. Hedges v. County Court of Ray County, supra; Sheppard v. May, 83 Mo. App. 275 (1900).

Section 228.110, RSMo 1978, provides five distinct procedural steps that must be complied with before an order vacating a public road can be granted by the county court. Briefly stated these steps are: (1) twelve freeholders from the township must petition for the vacation of the road; (2) such petition shall be publicly read on the first day of the term of court at which the petition is to be presented and the matter continued to the next term; (3) notice of filing of the petition must be posted in three public places at least twenty days before the next term of court; (4) personal service of a copy of the petition must be made on all persons whose land crosses or touches the road proposed to be vacated; and (5) the petition shall again be publicly read on the

Jo Beth Prewitt

first day of the term at which time the matter is to be heard. The statute provides an opportunity for other freeholders to be heard on the question of vacation.

Section 228.110.1, RSMo 1978, authorizes the county court to vacate a public road or part of a public road only if it is "useless, and the repairing of the same is an unreasonable burden upon the district or districts . . ." See, Ross v. Conco Quarry, Inc., 543 S.W.2d 568, 576 (Mo. App. 1976); Burrows v. County court of Carter County, 308 S.W.2d 299, 304-305 (Mo. App. 1957).

In view of the foregoing, we believe a county court must strictly comply with the procedures of Section 228.110, RSMo 1978, to vacate a county public road which has not been found to be abandoned. In sum, a county court must follow the statutory procedures, and make the requisite finding of fact, prior to vacating a public road. State v. Faith, 180 Mo. App. 484, 490-491, 166 S.W. 649, 651 (1914).

Your second question asks whether the county court entrusted with the duty to repair or maintain the public roads may cease to maintain a public road not vacated pursuant to statute or found to be abandoned. Generally, vacation or abandonment of the public road relieves the county of its duty to maintain because title to a vacated or abandoned road reverts to the abutting land owners in fee to the center of the road. State ex rel Reynolds County v. Riden, 621 S.W.2d 366, 370 (Mo. App. 1981).

Section 231.070, RSMo 1978, provides that "[i]t shall be the duty of the overseer [appointed pursuant to Section 231.020] to keep the roads . . . in as good repair as the funds at his command will permit. . . ." The county has a statutory duty to repair or maintain the roads. We believe that the duty to maintain such roads is absolute but only to the level of available funds. We do not believe, however, that a county court has the authority to choose not to maintain a public road unless the provisions of Section 228.010 have been followed or the road is found to be abandoned by the county court, pursuant to Section 228.190.

Jo Beth Prewitt

CONCLUSION

It is the opinion of this office that the county court of a third-class county must comply with Section 228.110, RSMo 1978, to vacate a county public road which has not been found to be abandoned. A county must maintain a public road to the level of funds available for that purpose.

This opinion, which I hereby approve, was drafted by my assistant, Mary Stewart Tansey.

Very truly yours,



JOHN ASHCROFT
Attorney General

CAMPAIGN FINANCE REVIEW BOARD:
PUBLIC RECORDS:
RECORDS:
SUNSHINE LAW:

Pursuant to Section 130.066(5), RSMo 1978, Campaign Finance Review Board members and staff may not disclose the existence of an investigation prior to an election involving the candidate or committee under investigation or the details of an investigation at any time despite the fact that such information is available from some other officer or agency. It is further our opinion that the Campaign Finance Review Board begins its investigation for purposes of Section 130.066(5) and (6) upon undertaking a review of reports and statements filed with appropriate election officers, upon receipt of the sworn, written complaint of a citizen alleging a violation of Chapter 130, RSMo, or upon the receipt of the findings of the Secretary of State or other appropriate election officer.

November 7, 1983

OPINION NO. 231-83

The Honorable James R. Strong
Senator, District 6
State Capitol, Room 417
Jefferson City, Missouri 65101

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Dear Senator Strong:

This is in response to your request, received in this office October 21, 1983, for an opinion on the following questions:

Does Section 130.066(5), R.S.Mo., prohibit members of the Campaign Finance Review Board, or the board's staff, from releasing information which would be a public record if it were in the possession of another public official (i.e., the Office of the Secretary of State, or the office of a County Prosecutor)? Specifically:

1. Is the Campaign Finance Review Board prohibited from releasing information regarding candidates or committees who fail to file or who have not filed on time, as that information appears on the face of records filed with County Clerks or the Office of the Secretary of State?

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2. Is the Campaign Finance Review Board prohibited from releasing the substance of a complaint received by the Board before any formal investigation by the Board or its staff has taken place?
- 2a. In reference to question number 2 above, is the release of such information affected by whether that release will take place before or after the election to which it applies?
3. At what point in time does an "investigation", as referred to in the statute, begin?
 - a. Upon receipt of a complaint by the Campaign Finance Review Board office?
 - b. Upon initial review by the Board's staff?
 - c. Upon decision by the Board to investigate the complaint?
4. What information constitutes "details"? Specifically, does the term include information contained in public records on file with other state and local governmental agencies?
5. What is the relationship between Section 130.066(5) and Section 610.100, et seq., R.S.Mo.? Specifically, is the Campaign Finance Review Board prohibited from releasing all information regarding complaints turned over to local prosecutors when that information is a public record in the hands of the prosecutor's office?

In providing our responses to your questions, we have taken the liberty of rearranging your questions to avoid unnecessary repetition. Irrespective of the order in which your questions are taken, Section 130.066(5), RSMo 1978, is central to their resolution. For your convenience, we quote it here.

The board shall have the following functions:

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* * *

(5) Review reports and statements filed with the appropriate officers, and upon review, if there are reasonable grounds to believe that a violation has occurred, may conduct an audit of such reports and statements. Any audit or investigation of a candidate's or his committee's reports and statements shall include an audit of the reports and statements of his opponent or opponents as well. All investigations by the board prior to an election shall be strictly confidential. Revealing any investigation information prior to such an election shall be a violation of this chapter and shall be cause for removal or dismissal of a board member or board employee. Details of all investigations shall be confidential with the exception of notification of the complainant or the person under investigation;

I.

At what point in time does an "investigation", as referred to in the statute, begin?

- a. Upon receipt of a complaint by the Campaign Finance Review Board office?
- b. Upon initial review by the Board's staff?
- c. Upon decision by the Board to investigate the complaint?

Section 130.066(6), RSMo 1978, provides:

The board shall have the following functions:

* * *

(6) Upon sworn written complaint of any citizen or upon findings reported to the board by the secretary of state, or other appropriate officers, audit and report apparent violations of this chapter to the appropriate prosecuting attorney;

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We do not believe that the Board possesses the authority to exercise discretion over whether to investigate a complaint properly referred to it pursuant to Section 130.066. The legislature has provided that the board "audit and report apparent violations" "[u]pon the sworn written complaint of any citizen or upon findings reported to the board" In State ex rel. McTague v. McClellan, 532 S.W.2d 870 (Mo. App. 1976), the court noted:

"[W]hen the statute creates an official duty in the interest of the public it is a different matter; and when the General Assembly imposes such a duty upon a public officer, he has no discretion as to whether or not it should be performed." State ex rel. Taylor v. Wade, 300 Mo. 895, 231 S.W.2d 179, 181-182 (en banc 1950). *Id.* at 871.

We interpret Section 130.066(6) as imposing upon the Board a mandatory duty to investigate whenever a proper complaint or finding is filed with it.

The General Assembly has not provided for the filing of Campaign Finance Disclosure Law reports or statements with the Board. Instead, the required reports must be filed with the Secretary of State (Section 130.056 RSMo Supp. 1982) or the appropriate officer (Section 130.026, RSMo Supp. 1982). The Board is empowered to review reports and statements "filed with appropriate officers. . ." and to conduct an audit "if there are reasonable grounds to believe a violation has occurred. . ." [Section 130.066(5)] or if there has been a complaint filed by a citizen or findings reported by the Secretary of State or other appropriate officer [Section 130.066(6)]. The information upon which the Board may initiate an investigation is information either reviewed by it on its own initiative for possible violations of the law or referred to it by a citizen or an appropriate officer who alleges a violation of the law. With regard to information either reviewed or received, it is our view that the Board's duties are purely investigatory.

Therefore, since the Board has no discretion to refuse to investigate a complaint, we believe that an investigation by the Campaign Finance Review Board begins with the Board's review of reports or statements filed with appropriate officers, its receipt of a sworn written complaint of a citizen or its receipt of finding of the secretary of state or other appropriate officers, whichever event occurs first.

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II.

What information constitutes "details"? Specifically, does the term include information contained in public records on file with other state and local governmental agencies?

When interpreting a statute, we are required to give the words used their ordinary meanings in the absence of a contrary definition provided by the General Assembly. Bethel v. Sunlight Janitor Service, 551 S.W.2d 616, 619 (Mo. banc 1977).

Webster's New International Dictionary (2nd Ed. 1946), defines "detail" as:

2. A part of a whole; spec. a A small and subordinate part; a particular; an item; a circumstance; - distinguished from outline, structure, design, etc.

Thus, we believe that "details", as the word is used in Section 130.066(5), are specific facts relating to an alleged violation of Chapter 130 which is or has been under investigation by the Board.

Your question appears less concerned with the definition of the word "details" than with whether such details can properly be made public by the Board or its members or staff if available through some other agency or officer. We will discuss that portion of your request next.

III.

Does Section 130.066(5), R.S.Mo., prohibit members of the Campaign Finance Review Board, or the board's staff, from releasing information which would be a public record if it were in the possession of another public official (i.e., the Office of the Secretary of State, or the office of a County Prosecutor)? Specifically:

Is the Campaign Finance Review Board prohibited from releasing information regarding candidates or committees who fail to file or who have not filed on time, as that information appears on the face of records filed with County Clerks or the Office of the Secretary of State?

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Section 130.066(5) states in part pertinent to these questions:

All investigations by the board prior to an election shall be strictly confidential. Revealing any investigation information prior to such an election shall be a violation of this chapter and shall be cause for removal or dismissal of a board member or board employee. Details of all investigations shall be confidential with the exception of notification of the complainant or the person under investigation; [Emphasis added.]

In Opinion No. 119-83, Kirkpatrick, August 29, 1983, we opined that the records of the Campaign Reporting Division of the Secretary of State's Office are open to the public. In addition, we concluded that the public may inspect memoranda of referral prepared by the Secretary of State for the Campaign Finance Review Board.

Neither Opinion No. 119-83 nor Section 130.066(5) can be read to grant members of the Campaign Finance Review Board or Board staff permission to disclose information in the Board's custody simply because it is available elsewhere. The legislature has prohibited Board members and staff from disclosing the existence of investigations prior to an election and the details of an investigation at any time. To further its intentions, the General Assembly provided that sanctions be imposed against those members or employees of the Board who breach the confidentiality of investigations as mandated by law.

We believe that the statutory prohibition against disclosure of matters relating to investigations focuses not on information but on the sources of information. Because the Board is charged with the administration of the Campaign Finance Disclosure Law and assuring compliance therewith, the General Assembly may have reasoned that the Board's disclosure of the existence of an ongoing investigation is more likely to foster a perception that "something is wrong" than would the disclosure of the same information by a agency not charged with enforcing the law. It further may have reasoned that candidates should not be made subject to the innuendo which might result from charges still under investigation and therefore, not proven. Whatever the reason, the prohibitive language of the statute is unqualified; public disclosure of the details of an investigation conducted pursuant to Chapter 130 may be made only by the filing of a charge in a court of law by appropriate prosecuting authorities. Therefore, it is our opinion that Board members and staff may not disclose the existence or details of an investigation irrespective of the fact that such information is properly available elsewhere.

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This view is consistent with our discussion at I, *supra*. The Board is not the agency with which statements and reports are filed. It has no legal duty to maintain such files or to disclose them pursuant to Chapter 610, given the strict confidentiality of Board investigations. Therefore, it is our opinion that the Board is prohibited from releasing information regarding candidates or committees who fail to file, or fail to file in a timely manner, reports required by law to be filed with the Secretary of State or other appropriate officer.

IV.

What is the relationship between Section 130.066(5) and Section 610.100, et seq., R.S.Mo.? Specifically, is the Campaign Finance Review Board prohibited from releasing all information regarding complaints turned over to local prosecutors when that information is a public record in the hands of the prosecutor's office?

Section 610.100, RSMo Supp. 1982, provides:

If any person is arrested and not charged with an offense against the law within thirty days of his arrest, official records of the arrest and of any detention or confinement incident thereto shall thereafter be closed records except as provided in section 610.120.

We do not need to reach the issue of whether records "in the hands" of the local prosecutor are public records. We have earlier concluded that Board members and staff are prohibited from disclosing information relating to the existence of an investigation by the Board prior to an election and from generally releasing details of an investigation at any time. We reiterate our position: Irrespective of the availability of investigation information from some other source, Board members and staff may not disclose such information.

V.

Is the Campaign Finance Review Board prohibited from releasing the substance of a complaint received by the Board before any formal investigation by the Board or its staff has taken place?

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Is the release of such information affected by whether that release will take place before or after the election to which it applies?

Section 130.066(5)) makes all investigations by the Board "strictly confidential" prior to an election. (We assume, for purposes of this opinion, that the election to which the statute refers is the election in which the candidate or ballot issue supported or opposed by the person or committee under investigation is to be voted upon.)

Your question asks whether the "substance" of a complaint can be released by the Board prior to the initiation of a formal investigation. We have earlier noted that an investigation begins upon the Board's receipt of a citizen complaint or the findings of appropriate officer. Thus, we believe that the confidentiality provisions of Section 130.066(5) prohibit the release of any information relating to an investigation prior to an election.

In Opinion Letter 142-80, Strong, June 16, 1980, we concluded that the details of an investigation are confidential, even after the election is completed. The language of Section 130.066(5) is somewhat ambiguous. By prohibiting the disclosure of details, the statute seems to permit the disclosure of nondetails after an election. Aside from a general disclosure of the types of violations investigated by the Board, we are unable to conceive of any disclosure of the substance of an investigation which would not also disclose details (e.g., the name of the person under investigation). Given the legislature's strong emphasis on confidentiality, we do not believe that the Board can disclose any facts relating to an investigation without violating the statutory prohibition against the disclosure of investigation details.

A strong Campaign Finance Disclosure Law is important to the conduct of honest election campaigns in Missouri. The legislature has not provided the Board with the tools it needs to enforce compliance with the law. In rendering this opinion, we can do no more than interpret existing law; we cannot rewrite the law to do more than the General Assembly has allowed by its express language.

CONCLUSION

It is the opinion of this office that, pursuant to Section 130.066(5), RSMo 1978, Campaign Finance Review Board members and staff may not disclose the existence of an investigation prior to an election involving the candidate or committee under investigation or the details of an investigation at any time despite the fact that such information is available from some other officer or agency. It is further our opinion that the Campaign Finance Review Board begins its investigation for purposes of Section

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130.066(5) and (6) upon undertaking a review of reports and statements filed with appropriate election officers, upon receipt of the sworn, written complaint of a citizen alleging a violation of Chapter 130, RSMo, or upon the receipt of the findings of the Secretary of State or other appropriate election officer.

Very truly yours,



JOHN ASHCROFT
Attorney General

Attorney General of Missouri

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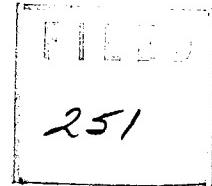
(314) 751-3321

DIRECT DIAL:

December 22, 1983

OPINION LETTER NO. 251-83

The Honorable E. J. Cantrell
Representative, District 82
State Capitol Building, Room 300
Jefferson City, Missouri 65101



Dear Representative Cantrell:

This letter is in response to your question asking:

Is a properly adopted ordinance the only method by which a fourth class city may employ special counsel (see Section 79.230 RSMo.).

The facts giving rise to this question are stated in your opinion request as follows:

The City Attorney of Overland, Mo. resigned under pressure from the Board of Aldermen. The Board of Aldermen wishes to appoint a Special Counsel. The Mayor opposes this step and will veto such an ordinance. There are insufficient votes on the Board to over-ride the veto. The question relates to whether the Board can appoint Special Counsel by motion or resolution without the Mayor's approval or a veto over-riding majority.

Section 79.230, RSMo 1978, states:

The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may,

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by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner. [Emphasis added.]

Fourth class cities are governed by the Dillon rule, which states:

"It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied."

State ex rel. City of Blue Springs v. McWilliams, 335 Mo. 816, 74 S.W.2d 363, 364 (Banc 1934) (quoting, 1 Dillon on Municipal Corporations, Section 89 (3rd Ed.)). Another rule governing fourth class cities is that where the General Assembly has prescribed the manner by which a municipal power will be exercised, the right to exercise the power given in any other manner is necessarily denied. McWilliams, 74 S.W.2d at 365.

Applying these principles to the instant question, we find: (1) that fourth class cities are expressly granted the authority to employ special counsel by Section 79.230, RSMo 1978; (2) that Section 79.230, RSMo 1978, prescribes the manner in which this power is to be exercised, i.e., the mayor and the board of aldermen are to enact an ordinance employing the special counsel; and (3) therefore, a fourth class city may not employ special counsel by a method other than a properly adopted ordinance.

Very truly yours,



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JOHN ASHCROFT
ATTORNEY GENERAL

December 20, 1983

OPINION LETTER NO. 254-83

The Honorable Anthony D. Ribaudo
Representative, District 65
State Capitol Building, Room 411-A
Jefferson City, Missouri 65101

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Dear Representative Ribaudo:

This is in response to your request for an opinion asking:

Are the provisions of Sections 1 of HCS
SS SB 250 as enacted by the 82nd General
Assembly, permitting the St. Louis Board of
Aldermen to grant additional compensation to
certain officials of the City, constitutional.

It is the general policy of this office not to opine on the constitutionality of statutes. See Gershman Inv. Corp. v. Danforth, 517 S.W.2d 33 (Mo. banc 1974). However, this question involves the application of the opinion of the Supreme Court of Missouri in Frances Baumli v. Howard County, et al., No. 64886, filed November 22, 1983, motion for rehearing denied December 20, 1983, a case with which this office is familiar and in which the Attorney General was a party. As such, your question is one seeking an interpretation of statute, not an opinion as to the constitutionality of a statute.

The language in Baumli that has caused some confusion states:

Article III, section 39(3), of the 1945 Missouri Constitution indicates the strictly limited authority of the legislature in connection with the appropriation of funds for compensation. This section prevents the state from retroactively awarding retirement benefits to a former judge. State ex rel. Cleaveland v. Bond, 518 S.W.2d 649 (Mo. 1975). It prohibits a municipality from modifying partially performed service contracts. Kizior

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v. City of St. Joseph, 329 S.W.2d 605 (Mo. 1959). It forbids the delegation of the legislative authority to fix additional compensation to non-legislative branches of government. City of Springfield v. Clouse, 206 S.W.2d 539, 545 (Mo. banc 1947). Because the legislature is so closely checked in its capacity to award extra compensation to public officers, the legislature cannot divest itself of its power by delegation in an effort to circumvent those checks. See St. Louis F. F. Ass'n Local No. 73 v. Stemmler, 479 S.W.2d 456, 465 (Mo. banc 1972), Seiler, J., dissenting; State ex rel. Rothrum v. Darby, 137 S.W.2d 532, 536 (Mo. 1940). Insofar as the statutes in question seek to transfer the power to grant additional compensation to the local level, the statutes conflict with the constitution. On this ground, too, they must fall.

Slip Op. at 4.

Section 1 of H.C.S.S.S.B. 250, 1983 Mo. Legis. Service 1026, 1031 (Vernon's), states:

Because of the additional duties which have been imposed on the circuit clerk, license collector, sheriff, circuit attorney, collector of revenue, treasurer, and recorder of deeds in cities not within a county by such cities, the board of aldermen of any such city, upon the approval of the board of estimate and control of any such city, may pay such officials an additional sum in an amount to be determined by the board; except that, the total compensation for any of such officials shall not exceed fifty thousand dollars per year. The additional compensation allowed under this section shall be in addition to other compensation provided by law for such officials and shall be paid in the same manner as such other compensation. [Emphasis added.]

The City of St. Louis is a unique governmental entity. Article VI, Section 31, Missouri Constitution, states:

The city of St. Louis, as now existing, is recognized both as a city and as a county unless otherwise changed in accordance with

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the provisions of this constitution. As a city it shall continue for city purposes with its present charter, subject to changes and amendments provided by the constitution or by law, and with the powers, organization, rights and privileges permitted by this constitution or by law.¹⁷

In State ex rel. Dwyer v. Nolte, 351 Mo. 271, 172 S.W.2d 854 (1943), the issue before the court was the proper salary of the Treasurer of the City of St. Louis. The court determined that the Treasurer was to be compensated pursuant to Section 13800, RSMO 1939, which authorized the county courts to pay the county treasurers "such compensation as may be deemed just and reasonable," The court stated:

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The Baumli decision construes Article VI, Section 11, Missouri Constitution. The predecessor of this constitutional provision, Article IX, Section 2, Missouri Constitution (1875) has been applied to the City of St. Louis. E.g., Henderson v. Koenig, 168 Mo. 356, 68 S.W. 72 (1902), overruled on other grounds, State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S.W. 783, 784-785 (banc 1912). We find Article VI, Section 11, Missouri Constitution, to be inapplicable to the City of St. Louis for a number of reasons.

First, the 1875 predecessor of Article VI, Section 11, Missouri Constitution, did not have an exception for counties which frame, adopt and amend a charter for their own government, as does the present version of the Constitution. The City of St. Louis has a charter form of government. See Article VI, Sections 31-33, Missouri Constitution.

Second, the City of St. Louis is not a de jure county. Stemmler v. Einstein, 297 S.W.2d 467 (Mo. banc 1956). Article VI, Section 11, Missouri Constitution, applies to counties only.

Third, assuming arguendo that the charter of the City of St. Louis does not exempt it from Article VI, Section 11, Missouri Constitution, and that the City of St. Louis is a "county" for purposes of this constitutional provision, the City of St. Louis is in a class by itself, and this pursuant to constitutional authority. State ex inf. Gentry v. Armstrong, 315 Mo. 298, 286 S.W. 705, 707 (banc 1926); State ex rel. McClellan v. Godfrey, 519 S.W.2d 4, 7 (Mo. banc 1975). Article VI, Section 11, Missouri Constitution, requires uniformity only in each class of county.

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"It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office is purely legislative in character. That power, as respects the office of county treasurer, the Legislature has delegated to the county court, the agency most familiar with the fiscal affairs and financial condition of the county, as well as the services required to be performed by the treasurer--which may vary in different counties and at different times in the same county. The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only. Its action in the exercise of that discretion is not subject to judicial review, for the simple reason that neither the statute which confers the discretion nor any other makes it so."

Nolte, 172 S.W.2d at 856 (quoting, State ex rel. Dietrich v. Daues, 315 Mo. 701, 287 S.W. 430, 431-432 (banc 1926)).

The Nolte case clearly shows that the General Assembly may delegate to the Board of Aldermen of the City of St. Louis the authority to exercise discretion in the setting of salaries. See Slater v. City of St. Louis, 548 S.W.2d 590, 592 (Mo. App. 1977). Accordingly, we believe the above-quoted dicta in Baumli should not be read as invalidating Section 1 of H.C.S.S.S.B. 250, supra.

Very truly yours,



JOHN ASHCROFT
Attorney General